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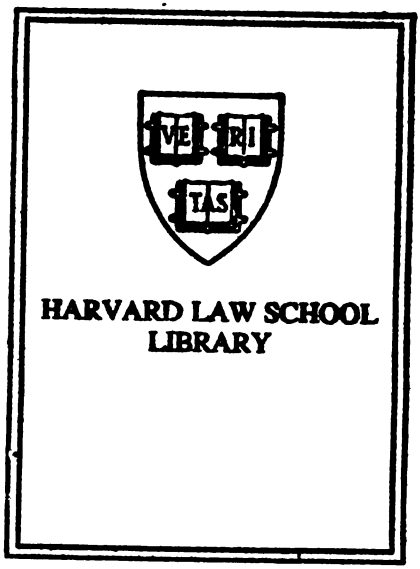

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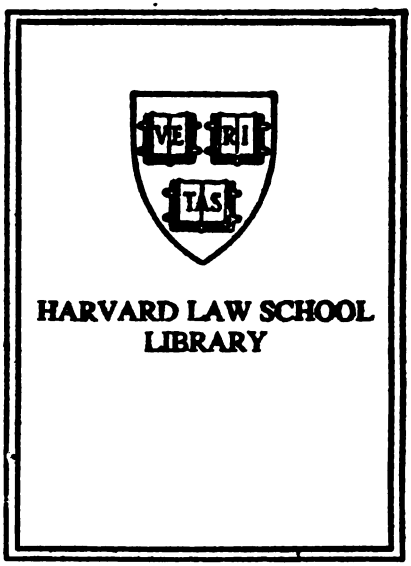

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CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

APRIL 13 TO OCTOBER 12 1881

HENRY A. CHANEY

STATE REPORTER

VOL 46

CHICAGO
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1882

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The head notes to the opinions in *Beyschlag v. Van Wagoner*, p. 91, *Garrison v. Steele*, p. 98, *Reading v. Waterman*, p. 107, and *Wilkins v. Detroit*, p. 120, filed by Mr. Justice CAMPBELL at the April term, 1881, are by Judge CAMPBELL.

The head notes to opinions filed by Mr. Justice COOLEY at the October term, 1881, are by Judge COOLEY.

The index to this volume is by Mr. ALBERT P. JACOBS of the Detroit bar.

Rec. Sept. 23, 18[illegible]

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ISAAC MARSTON.

ASSOCIATE JUSTICES

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THOMAS M. COOLEY,
JAMES V. CAMPBELL.

ATTORNEY-GENERAL

JACOB J. VAN RIPER

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6. SILAS B. GASKILL.
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19. JAMES B. JUDKINS.
20. DAN J. ARNOLD.
21. HENRY HART.
22. GOUVERNEUR MORRIS.
23. JONATHAN B. TUTTLE.
24. LEVI L. WIXSON.

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* Term expired June 7, 1881. † Term opened June 7, 1881.

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SUPREME COURT RULE 57.

At a session of the Supreme Court held June 14, 1882, Supreme Court Rule 28 which provided that "The *evening of the* second Thursday in each term is designated for the examination of applicants for admission to the bar" was amended by striking out the words "evening of the," so that the first sentence of said rule is now as follows:

RULE 57. The second Thursday in each term is designated for the examination of applicants for admission to the bar, and no examinations will occur at other times.

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APRIL TERM 1881.*

BENJAMIN S. COMPTON v. JAMES BLAIR.

Accommodation acceptance—Estoppel by casual admission—Indemnity bond.

A creditor's failure to present promptly a draft drawn in his favor, and accepted for accommodation only, does not release the debtor where the drawee was never supplied with funds to meet it, and the maker suffered no loss by the neglect; especially if after protest the maker recognized his continued liability for the debt.

Casual statements made by the holder of a draft, or on his behalf, to the effect that it has been paid, do not estop the creditor from enforcing its payment if the debtor is not actually misled by them.

A judgment debtor sought to enjoin the collection of the judgment to the amount of a draft which he had given as collateral security, but which the creditor had failed to collect. It had been accepted merely for accommodation and without funds to pay it, and the drawee had afterward failed. The suit for injunction was brought more than seven years after it had gone to protest, and it was decreed that complainant pay the amount found due on the judgment. *Held*, that the objection that defendant should have been required to surrender the draft, or, if it were lost, give an indemnifying bond, had no force, especially if raised for the first time in the appellate court.

Appeal from Monroe. Submitted Apr. 5. Decided Apr. 13.

BILL for injunction. Complainant appeals. Affirmed.

Grosvenor & Landon and *John H. Doyle* for complainant. The payee's unreasonable delay to present a draft for payment makes it his own and discharges the debt: Story on Bills §§ 108–9; Story on Prom. Notes § 406; *Chamber-*

* Continued from Vol. 45.

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lyn v. Delarive 2 Wils. 353; *Ward v. Evans* 2 Ld. Raym. 928; *Dayton v. Trull* 23 Wend. 345; *Brower v. Jones* 3 Johns. 229; *Hays v. McClurg* 4 Watts 454; *Mehelm v. Barnet*, Coxe (N. J.) 87; *Shaw v. Gookin* 7 N. H. 16; *Harris v. Johnston* 3 Cr. 311; an indorser about to take up a protested note is discharged by honest, but mistaken information from the holder that it has been paid, if such information prevents his resorting to the maker: *Kingsley v. Vernon* 4 Sanf. 361; *Gamage v. Hutchins* 23 Me. 567; *Oxford Bank v. Haynes* 8 Pick. 426; *Allan v. Eldred* 50 Wis. 132; 10 Rep. 575.

Willits & Critchett and *C. A. Stacy* for defendant.

Cooley, J. The bill in this case is filed to restrain the collection of the balance alleged to be due on a judgment, rendered in the circuit court for the county of Monroe, in favor of defendant and against the complainant in May, 1872, for the sum of $10,751.03 and costs of suit. The litigation has twice before been in this court. *Compton v. Blair* 27 Mich. 398; *Blair v. Compton* 33 Mich. 414.

The controversy now relates to the application upon the judgment of a certain draft, drawn by Compton, as president of the West Virginia Oil & Oil Land Company, on J. H. Carrington & Co. of New York city, dated July 22, 1873, and drawn at two months for the sum of $3120. Complainant claims that this draft should be applied, and defendant resists the claim.

This draft, it appears, was handed over to the attorneys who had procured the judgment, on the day it bears date, and was by them receipted with other drafts, at the time when an execution was in the sheriff's hands and after a levy had been made. The receipt specifies that "If one or all of these drafts are accepted and paid, they are to apply, so far as paid, in satisfaction of an execution in this cause now in the hands of Philip Nadeau, the late sheriff. If any one of them is not accepted, or if any one of them is not paid at maturity, the plaintiff in this case is at liberty to take such steps as he

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may be advised to enforce the collection of the judgment in this cause. It being distinctly understood that these drafts are only collateral security for the payment of the judgment in this cause, and the lien now had by the levy of execution upon the property of the defendant is in no way released or abandoned, but is held to await the acceptance and payment of the above-described drafts."

The draft in question was accepted by the drawees, but when it fell due was protested for non-payment. Question is made in the case whether the drawer was ever notified of the non-payment, but the evidence of notice is satisfactory to our minds. It was subsequently placed in the hands of Judge Joseph Casey, who was principally interested in the judgment, and was by him forwarded to an attorney in New York with instructions to take prompt steps for collection. The instructions were not closely followed, but the record discloses efforts by the attorney to obtain payment without suit, which continued until the spring of 1875, when J. H. Carrington & Co. failed. The reason suit was not brought is now suggested to be, because the attorney had lost the draft, a fact which he did not at the time make known to any of the parties.

If by the failure to collect this draft, Compton or the company which drew it could be loser, there would be some ground for claiming, on the facts so far stated, that the creditor had made it his own. But the evidence is entirely satisfactory that the draft was accepted for the accommodation of the drawer, and that the drawees had no funds with which to meet it, and were never put in funds afterwards. Carrington so testifies, and his evidence is much more full, explicit and satisfactory than that of Compton, who undertakes to dispute him. But it also appears that Compton distinctly recognized his liability for the amount represented by the draft long after it had been protested; that in May following he promised to give good paper in place of it, and that a month later he was endeavoring to procure a renewal. After that time there was never any offer on his part to take it up, and never any new obligation assumed by Blair or

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Casey to press it to collection for his benefit, if indeed it was collectible.

It is also claimed by Compton that Blair has estopped himself from now treating this draft as unpaid, by various representations made at different times by his attorneys that the draft had been paid, or that Compton need give himself no further concern on the subject, or other words of similar import. If such statements were made and were relied upon by Compton to his injury he would undoubtedly have an equitable claim to relief. But is clear enough that Compton never supposed this draft had been paid, and never lost anything by reason of statements made by the attorneys, upon which he now relies by way of estoppel. There were undoubtedly statements made at different times by Mr. Norris and Mr. Willits, acting as attorneys in the collection of the judgment, which a stranger to the facts might have understood as Compton now claims they should be; but they were made either while the collection of other drafts was the matter immediately in hand, or at a time when the judgment was apparently satisfied by a sale which was afterwards set aside. Compton was never misled by them, for he knew quite as well as the attorneys did that the draft had never been paid. Casual remarks are not to be made to operate as an estoppel when nobody is misled by them and nobody harmed. *Ferguson v. Millikin* 42 Mich. 441. The only fact Compton can claim not to have known was the loss of the draft; but as he never called for its surrender to him, he cannot claim that the loss affected his action. He might have raised a question upon this fact if he had called for the draft to bring suit; but this he failed to do, and Carrington & Co., who seem to have been more willing to reach an adjustment than he was, instituted suit after a time for a large sum which they claimed the Oil Company owed them.

When the court of chancery adjudged that complainant had no equities, a decree was made that defendant pay the sum found due on the judgment which was computed at $6250. A technical objection is now made to this decree, that the court should have ordered the Carrington draft

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delivered up, or, if it was lost, that an indemnifying bond be given by defendant. No doubt such a bond would have been ordered if defendant had been the moving party; but he already had his judgment and Compton had failed to make out a case for restraining its collection. It was not, under such circumstances, a necessary condition to the collection of the judgment that Blair should give a bond of indemnity: the mere dismissal of the bill without further order would have left him at liberty to proceed in the collection of his judgment. As it is now more than seven years since the draft was protested for non-payment, it is not likely any party to it can suffer from its non-production. And as there is nothing in the case to indicate that this point was ever made before, we do not think it entitled to notice now.

The view we take of the facts renders it unnecessary to consider the law points made on behalf of complainant.

The decree must be affirmed with costs.

The other Justices concurred.

ORAMEL G. STEBBINS v. CHARLES H. WALKER AND WILLIAM. A. SUMNER.

Estoppel—Waiver of lien—Personal liability.

A firm of commission brokers, having settled with a grain dealer with whom they did business, solicited his farther shipments. He replied that he did not know when he should resume business, but suggested they should correspond with his brother, whose initials, he said, were the same as his own. The brokers understood this to mean that he intended to remain out of business for a time, and they wrote him informing him how they understood his letter, and stating that they had solicited his brother's consignments, but he made no reply. He soon resumed control of the business, however, but kept his brother in his employment without notifying the brokers of the new arrangement. His own name was Oramel and his brother's, Osmyn. The brokers having entered upon the suggested correspondence, transacted considerable business with Osmyn, in whose charge the business had been left, and who was acting, as they supposed, as

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principal, but really as agent. In the course of these dealings they realized a certain profit on a car load of wheat received from him, and they bought a quantity of wheat at his request. They also lent him a large sum of money, and soon after discovered that he had never been the principal in the business, and that before borrowing the money he had left his brother's employment. Oramel offered to take the wheat they had bought, off their hands, but they refused, expressing a willingness to hold it until it should rise in value. They also retained the profit on the car load they had sold, to apply on the account for money lent to Osmyn, and Oramel sued them for it. *Held* (1), that as his own course had misled the brokers into supposing that they were dealing with Osmyn as a principal, and he had neglected to inform them differently, he was estopped by his own negligence from objecting to their applying the proceeds of the sale upon Osmyn's debt, and from claiming the proceeds on the ground that the car load belonged to himself; (2) that the brokers, in merely expressing a willingness to hold the wheat they had bought until it rose, did not waive any existing lien upon it, and as there was no consideration for a waiver, and no promise to waive the lien was asked or obtained, the brokers were at liberty to stand on their rights as they were when they first learned that the business carried on by Osmyn was that of his brother.

Where one of two innocent parties must suffer a loss occasioned by the negligence of one of them, it must rest on the one who caused it, however honest his intentions may have been.

Where liens on property are accompanied by a personal responsibility the creditor has a right to rely on both.

Error to Wayne. Submitted April 5-6. Decided April 13.

Assumpsit. Plaintiff brings error. Affirmed.

Latham & Case for plaintiff in error. Estoppel *in pais* by neglecting to speak or act does not exist where the party did not know the facts which, if known, would have made it his duty to speak: *Delaplaine v. Hitchcock*, 6 Hill 17.

John W. McGrath and *C. I. Walker* for defendants in error. Payment to an agent is good as against the principal where he is dealt with as principal without knowledge to the contrary: Story on Agency § 430; Whart. Agency §§ 206, 405, 465; *George v. Clagett* 7 Term 355; *Taintor v. Prendergast* 3 Hill 72; *Traub v. Milliken* 57 Me. 63; *Isberg v. Bowden* 8 Exch. 858; *Foster v. Smith* 2 Coldw. 478;

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Lime Rock Bank v. Plimpton 17 Pick. 159; a factor has a lien on property in his charge for advances, disbursements and a general balance: Story on Agency §§ 376-8; Whart. Agency §§ 767-9; 3 Pars. Cont. § 258-60; *Bryce v. Brooks* 26 Wend. 375; a lien is not waived by an unexpressed state of mind: 2 Kent's Com. § 638; Story on Agency §§ 362-6; Whart. Agency §§ 772, 818, 820; Phillips on Liens §§ 449-505; *Walker v. Birch* 6 Term 262; *Cowell v. Simpson* 16 Ves. 280; *Pinnock v. Harrison* 3 M. & W. 532; *Hutchins v. Olcutt* 4 Vt. 549; *Stoddard Mnfg. Co. v. Huntley* 8 N. H. 441; *Bailey v. Adams* 14 Wend. 201; *Peyroux v. Howard* 7 Pet. 341; *Clark v. Stilson* 36 Mich. 482; *McMaster v. Merrick* 41 Mich. 505.

Cooley, J. This case was sent to a referee by the circuit court, and judgment was given in favor of defendant on the referee's report. The important facts in the case are the following:

For some time prior to June, 1879, and up to August of that year, plaintiff was a dealer in grain at Vermontville in this State, and defendants were commission brokers and members of the Board of Trade of Detroit. As commission brokers they had bought and sold for the plaintiff previous to the 30th of June, 1879, and made advances which were all settled on that day. On August 14, 1879, plaintiff made a conditional sale of his business to his brother Osmyn G. Stebbins. The conditions were to be performed within a week thereafter, but they were not performed, and at the end of the week plaintiff resumed his business and took possession of his property, which in the meantime his brother had had and controlled. A few days before this the defendants had written the plaintiff, soliciting his shipments, and in reply they received the following letter:

"Office of O. G. Stebbins,
Thornapple Valley Mills,
And dealer in Grain, Feed, Land, Plaster, etc.
Vermontville, Mich., Aug. 14, 1879.

Messrs. Walker, Sumner & Co.:

Your letter of the 4th of August was duly received at my stopping place, and by reason of my absence from home and

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general inattention to business lies unanswered. At the opening of the new crop trade this season I did not think I should engage in active work at all at present; and as I am yet unable to labor, I do not know when I shall take hold again. I am now seriously contemplating a trip to Colorado. My brother is at work in a mild way in the wheat business, but he has so far seen fit to ship to another party, from whom he gets the same rebate as you offer. His initials are the same as my own, so that if you choose to correspond with him, the same direction will reach him as myself.

Thanking you for your efforts in my behalf,

I remain truly yours,

O. G. STEBBINS."

This letter was understood by defendants to mean that the plaintiff intended to remain out of business for a time, and that the brother Osmyn was then in the wheat business in Vermontville, and thereupon they addressed a letter to Osmyn, soliciting his business. They also wrote to the plaintiff informing him how they understood his letter, and that they had solicited his brother's consignments. To this the plaintiff sent no reply, and until November 26th following defendants supposed the dealings with them in the name of O. G. Stebbins hereinafter mentioned were on behalf of Osmyn G. Stebbins, and had no information and no reason to suspect the contrary. These dealings began after September 17th, on which day plaintiff left home for his health and remained absent until October 24th, leaving his brother Osmyn in charge of his business. While he was gone Osmyn shipped to defendants five car loads of wheat in the name of O. G. Stebbins and for the plaintiff, but which defendants received, sold and accounted for, supposing it to be the wheat of Osmyn himself. On these dealings a balance remained due to the defendants of $74.64. There was also sent to defendants a car load of wheat which was placed in the elevator, but by reason of some mistake, owing to a change of bookkeepers, was not credited to any one. This also belonged to the plaintiff. Early in November defendants also made a purchase of wheat, and also a sale of it which they supposed to be for Osmyn, but which was in

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reality on an order from plaintiff, on which they realized a profit of $307.50, and which left standing to the credit of O. G. Stebbins on their books $232.86.

Osmyn G. Stebbins left his brother's employ November 5, 1879. On November 15th he telegraphed defendants from Jackson in the name of O. G. Stebbins, asking them to send him $700. Relying upon his personal credit they sent the money. At the same time he requested them to purchase for O. G. Stebbins 3000 bushels of wheat for January delivery. With this request they also complied.

On November 26th defendant Walker was at Vermontville, when he for the first time learned that plaintiff had resumed business, and that all the wheat dealings previous to November 15th had been conducted by Osmyn as agent, not as principal. Plaintiff told Walker he had no interest in the purchase of November 15th, but would take it off defendants' hands. This he could then have done at a profit of $150. Walker declined this offer, but said he would stand upon the purchase until he could realize $700 profit upon it, and then close it out. The wheat was afterwards sold, however, without profit. Afterwards plaintiff had other dealings with defendants which entitled them to claim from him $79.75. The car load which by mistake was not credited to any one, was sold by defendants in January following, and realized $452.79. The defendants claimed they were entitled to apply this and also the $232.86 which was in their hands to the credit of O. G. Stebbins, on November 15, 1879, as part payment of the $700, which Osmyn G. Stebbins obtained from them on that day. Plaintiff resisted this claim, and demanded from defendants the proceeds of all the wheat belonging to him which had been forwarded to and sold by them.

The circuit court gave judgment for the defendants, applying the $232.86 and $452.79 in accordance with their claim, and permitting them to recover the balance of $79.25 on subsequent dealings. This would leave a balance of $14.35 of the $700 still unpaid.

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Was this judgment correct? We think it was. Defendants from August 14th to November 5th had been dealing with Osmyn G. Stebbins in the belief that he was principal in the business, induced to that belief by the letter and subsequent conduct of the plaintiff, and having no reason to think or suspect the contrary. Plaintiff knew that the manner in which the business was done and the correspondence conducted, was calculated to lead the defendants to suppose that he had retired from the business, and Osmyn had become his successor. When Osmyn left his employment, no notice was given to defendants, and to all appearance the business continued as before. The defendants were therefore not in fault, and were chargeable with no negligence in assuming that Osmyn still continued to be the principal. He had forwarded several car loads of wheat to defendants in the name of O. G. Stebbins prior to November 5th, and received the proceeds in the name of O. G. Stebbins, and it is conceded that payment was properly made to him, though the wheat belonged to the plaintiff. Defendants supposed the wheat belonged to Osmyn, but it is conceded that if they had known the plaintiff was owner, the payment to Osmyn would have been a valid payment, because Osmyn was the plaintiff's agent and doing business in the plaintiff's name. But if a payment to Osmyn before November 5th was good, one after November 5th must have been equally good. Defendants had no notice of any change in the business, and in fact there had been none. The same person who had sent wheat to them, and who they supposed and had a right to suppose was the principal, requested of them an advance, and they made it. The referee reports that defendants relied, in making this advance, on the personal credit of Osmyn; but their reliance on his credit would not preclude their relying also on their lien upon the grain received from him. Liens on property are commonly accompanied by a personal responsibility, and the creditor is entitled to rely upon both.

The case in judgment is a plain case of estoppel. There has been negligence from which one of two parties must

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suffer, and the responsibility for this negligence justly and exclusively lies at the door of the plaintiff. If he were now to collect of defendants the sum they advanced to his brother while he was acting ostensibly as principal, they would be defrauded, and the plaintiff's negligence would have furnished the opportunity, and the agent. The loss must therefore fall upon the plaintiff, though his intentions may have been entirely honest: *Vanneter v. Crossman* 42 Mich. 465. Nor has there been any failure here, as there was in *Maxwell v. Bay City Bridge Co.* 41 Mich. 453, to find the facts from which the estoppel springs: they all appear in the referee's report.

It is claimed that defendants waived the lien on the car load of wheat remaining in their hands when they were informed of plaintiff's interest; but the record shows no express waiver, and no facts from which it must necessarily be implied. They did indeed express a willingness to hold the January wheat until the rise in value should make good their loss; but there was no agreement to that effect, and if there had been, a desire to protect the plaintiff against loss might sufficiently account for it. They also declined plaintiff's offer to take the January wheat off their hands, coupled as it evidently was in his mind with leaving them to lose the $700 advance; and for this they cannot be blamed. It was talked over between the parties that defendants should proceed to sell the car load of wheat then on hand; but if plaintiff expected defendants to waive any existing lien, and pay over to him the proceeds, he neither gave any consideration therefor, nor asked or obtained any promise to that effect. The defendants were therefore at liberty to stand upon their rights as they existed at the time they first learned that the business carried on with them by Osmyn in the name of O. G. Stebbins was really the business of the plaintiff.

The judgment must be affirmed, with costs.

The other Justices concurred.

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JOHN DE HAAS, RELATOR v. NEWAYGO CIRCUIT JUDGE.

Settlement of case after resignation of trial judge.

Mandamus to settle a case for review will not issue to a judge who has resigned since filing his answer to the order to show cause. Relief should be asked from his successor.

Mandamus. Motion submitted April 6. Denied April 13.

Ed. E. Edwards and *A. G. Day* for relator.

MARSTON, C. J. We are of opinion that the circuit judge should have settled a case for review in this court, but as he has since the answer was filed resigned, the writ as prayed for cannot be issued. The relator should apply to the present circuit judge for relief, who undoubtedly would grant a new trial, if upon examination he became satisfied that justice would be advanced thereby.

The other Justices concurred.

SARAH M. MONROE v. THEODORE AUGUSTE HEINTZMAN, JOHN D. STANDISH AND CHARLES H. FREEMAN.

Costs on certiorari secured by bond in replevin.

A replevin bond covers the costs of all courts even though the case be removed on *certiorari* from before a justice, if a final judgment on writ of error awards all costs below.

Error to Wayne. Submitted April 6. Decided April 13.

DEBT on bond. Sarah M. Monroe was assignee of a replevin bond to Jane Sterling, upon which Standish & Freeman were sureties for Heintzman, the plaintiff in replevin. The suit began before a justice, and was taken on

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certiorari to the circuit from which it was removed on writ of error to the Supreme Court, where the defendant prevailed, and the judgments below, both of which had been in favor of the plaintiff, were reversed, *with costs of all the courts: Stirling v. Heintzman* 42 Mich. 449. The assignee of the bond recites these facts in her declaration, and claims to be entitled to recover the costs adjudged against Heintzman. Defendant Standish demurred to the declaration on the ground, among others, that he was not liable for costs of the Supreme or circuit court. The case was heard on demurrer, and judgment given thereon for the defendant. Plaintiff brings error. Reversed.

James H. Pound for plaintiff in error. *Certiorari* proceedings are not a new suit: *Fisher v. Thirkell* 21 Mich. 1; *Dunn v. Sutliff* 1 Mich. 24; *Smith v. Crouse* 24 Barb. 436; *Bennet v. Rathbun* 17 Johns. 37; *Volk v. Youngs* 1 Cow. 425; *Brabon v. Pierce* 34 Mich. 39; *Bennett v. Brown* 20 N. Y. 102; *Robinson v. Plimpton* 25 N. Y. 484.

Moore, Canfield & Warner for defendant in error. Distinction is made between an appeal and proceedings on *certiorari: Fenno v. Dickinson* 4 Den. 84; sureties on a replevin bond are not liable for costs of the Supreme Court on error: *Clark v. Quackenboss* 28 Ill. 112; *Hinckley v. Kreitz* 58 N. Y. 583; *Babbitt v. Finn* 101 U. S. 7.

GRAVES, J. This is a writ of error brought to reverse a judgment given for the defendant on demurrer to the declaration. The case is governed by *McLean v. Isbell* 44 Mich. 129.

The judgment is reversed and the demurrer overruled with costs. The cause must be remanded for further proceedings, and my brethren are of opinion that the court below may in its discretion permit the defendant in error to plead over.

The other Justices concurred.

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CAROLINE STECKER, ADM'X v. WILLIAM C. SMITH ET AL.

Partnership liability—Question of fact.

Where several persons put up a building as partners, and one of them buys brick for the purpose without an express understanding with the vendor that it is an individual purchase, and the brick is actually used in the building, the partners are liable as such for its value.

In an action against several defendants impleaded as partners, the plaintiff is entitled to lay all the facts before the jury and have their opinion as to whether the transaction was not that of a partnership, or did not, at least, entitle plaintiff to charge defendants as partners.

Error to Wayne. Submitted April 6. Decided April 13.

ASSUMPSIT. Plaintiff brings error. Reversed.

James H. Pound for plaintiff in error.

Atkinson & Atkinson for defendants in error.

GRAVES, J. Plaintiff's intestate brought *assumpsit* against the defendants as copartners before a justice of the peace to recover for certain brick furnished them. A recovery was allowed in that court and defendants appealed, but prior to the trial in the circuit court Mr. Stecker died and the plaintiff was duly authorized to assume the prosecution of the action. On the hearing of the case the circuit judge directed a verdict for the defendants. The plaintiff claimed that the defendants were partners in putting up two certain buildings, and that the bricks were procured by the firm for those buildings and actually used as materials therein.

A witness for the plaintiff testified that one of the defendants contracted individually for the brick, and another witness on the same side testified that one of the defendants admitted that brick were received, but that they were

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on his own account and not for the partnership. The plaintiff then offered to show that the defendants were in partnership in putting up the buildings for which the brick were obtained and in which they were used, but the court on objection excluded the evidence.

This was error. The statement made by the witness that the brick were purchased by one of the defendants on his individual account, was not necessarily conclusive. In the first place it was more matter of opinion than of fact, as represented by the record. But in any court the plaintiff was entitled to lay all the facts before the jury and have their judgment on the question whether the purchase was not a partnership transaction, or at least one which entitled the plaintiff to charge the defendants as partners. If in point of fact they were erecting the buildings as partners, and one of them procured the brick for the purpose of the buildings without any express arrangement with plaintiff's intestate that the purchase was an individual purchase, and the brick were used in the buildings, the firm was liable.

The judgment is reversed with costs and a new trial granted.

The other Justices concurred.

MERRITT E. CASTNER AND RACHAEL A. CASTNER v. THE FARMERS' MUTUAL FIRE INSURANCE COMPANY OF VAN BUREN COUNTY.

Joint insurance—Description—Title—Insurance by agents.

A fire insurance company, on being sued for a loss, cannot defend on the ground that the risk was increased by a neighboring dry-house which was not described in the application for insurance, where, in fact, the proof of loss showed its position, and the notice of refusal to pay treated it as included in the policy, but not properly heated, and did not rely upon undue concealment of its proximity.

A person applying for insurance on property is not required by law to explain the exact state of the title nor the precise nature of his interest in it, if he is not distinctly required to do so by the company.

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The custodians of property, such as factors, agents, or consignees, can insure it for the benefit of present owners or notwithstanding changes of ownership.

An insurance policy may be taken jointly to secure property owned in severalty.

A policy of insurance on property is good for all the owners for whom it is made though they have several as well as joint interests, and when it all belongs to the parties insured it makes no necessary difference to the insurer how their interests are apportioned.

The Supreme Court cannot on error pass upon a question of fact not submitted to the jury, and not admitted by the opposite party.

Error to Van Buren. Submitted Apr. 6. Decided Apr. 13.

Assumpsit. Plaintiffs bring error. Reversed.

Lester A. Tabor for plaintiffs in error. Insurance may be given to protect joint interests: *Van Schoick v. Niagara Fire Ins. Co.* 68 N. Y. 436; and the insured may sue on the policy jointly: *Farni v. Tesson* 1 Black 309; *Capen v. Barrows* 1 Gray 376; *Foley v. Addenbrooke* 4 Q. B. 197; *Anderson v. Martindale* 1 East 497; *Ludlow v. McCrea* 1 Wend. 228; *Buckner v. Hamilton* 16 Ill. 487; suit must be brought in the name of the parties contracted with: 1 Chit. Pl. 3; *Montague v. Smith* 13 Mass. 405; *Howe v. Howe* 1 N. H. 49; *Smith v. Emery* 7 Halst. 53; *Wheelwright v. Beers* 2 Hall 391; *Barndoller v. Tate* 1 S. & R. 100; *Treat v. Stanton* 14 Conn. 445; *Millard v. Baldwin* 3 Gray 484; though their interests in the proceeds be unequal and distinct: *Marshall v. Moseley* 21 N. Y. 287; *Hill v. Gibbs* 5 Hill 56; *Martin v. Crompe* 1 Ld. Raym. 340.

Chandler Richards and *Mills, Crane & Hilton* for defendant in error. As to the rule as to the divisibility of insurance contracts, see *Peoria Ins. Co. v. Hall* 12 Mich. 202; *Hartford Fire Ins. Co. v. Davenport* 37 Mich. 609; *Ætna Ins. Co. v. Resh* 40 Mich. 243; *Agricultural Ins. Co. v. Montague* 38 Mich. 548; authority preponderates against it: *Lowell v. Ins. Co.* 8 Cush. 127; *Brown v. Ins. Co.* 11 Cush. 280; *Friesmuth v. Ins. Co.* 10 Cush. 587; *Patten v.*

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Ins. Co. 38 N. H. 338; *Fireman's Associate Ins. Co. v. Assum* 5 Ind. 165; *Columbian Ins. Co. v. Laurence* 2 Pet. 25; *Bowman v. Ins. Co.* 40 Md. 620; *Lovejoy v. Ins. Co.* 45 Me. 472; *Gould v. Ins. Co.* 47 Me. 403; *Barnes v. Ins.* Co. 51 Me. 110; *Wilson v. Ins. Co.* 6 N. Y. 53; *Fire Association v. Williamson* 26 Penn. St. 196; *Gottsman v. Ins. Co.* 56 Penn. St. 210; *Hinman v. Ins. Co.* 36 Wis. 159; *Eminence Ins. Co. v. Jesse* 1 Metc. (Ky.) 523.

CAMPBELL, J. Plaintiffs sued upon a policy of insurance issued to them jointly on a dwelling and personal property contained in it, both of which were destroyed by fire. The house was occupied by both—being mother and son—but each occupied separate portions, and the son owned the fee subject to his mother's life interest. The personal property was also owned in severalty, the son's property being the largest part. The fire caught from a dry-house near the dwelling, as was shown by plaintiffs.

The defense urged on the trial was—*first*, that the property was not joint; *second*, that the policy was destroyed or suspended by default on assessments; and *third*, that the dry-house increased the risk, and was not described in the application.

The circuit court ruled in favor of defendant on the question of joint interest, and did not decide the other points; but defendant claims that if any of these were well taken, the judgment cannot be reversed.

It appears from the record that after proof of loss, which in regard to the personal property, at least, showed a separate title in Mrs. Castner to a part of it, the company refused to pay on two grounds: *first*, failure to pay assessments; and *second*, the use of a stove in a room without a chimney.

The objection, therefore, that there had been an undue concealment of the proximity of the dry-house cannot be relied on, for the proof of loss showed its position, and the company by the notice seem to have treated it as part of the property insured, but as not properly heated. There

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may be some question how far they were informed concerning the title.

We do not think the objection based on the condition of the title is valid. It is quite common to require the insured to explain the exact state of the title, and of course where this is required it may become or be made material. But in the absence of such a requirement we think the law has not required so minute accuracy. The chief reason for looking to ownership is to prevent wager policies, and to confine the insurance to an indemnity. But it has always been competent for parties to insure property in their custody for the benefit not only of other present owners, but also notwithstanding changes of ownership. Factors, agents and consignees do this without objection. *Rogers v. Traders' Ins. Co.* 6 Paige 583; *DeForest v. Fulton Fire Ins. Co.* 1 Hall (N. Y.) 84.

Neither does it seem necessary that the precise nature of the interest should appear in the application or policy, unless distinctly required. And if insurance is made for various parties, and they have several as well as joint interests, the policy is good for all. *Foster v. U. S. Ins. Co.* 11 Pick. 85.

There was a time when it was of very little consequence what interest an insured party had. It is no doubt against public policy to allow mere gambling in insurance. But when the entire property belongs to the persons insured, it can make no necessary difference to the insurer in what way their interests are apportioned. If they deem it material they should inform the applicant before accepting his money.

There is nothing in the record which would enable us to determine that there was anything wrong about the dry-house, even if the objection that its position was concealed had not been waived.

Our attention has not been called to any provision of the corporation agreement or rules which binds a party by notice of assessments not brought home to him. But we could not properly pass upon a question of fact not submitted to the jury, and not admitted by the plaintiffs.

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The judgment must be reversed with costs, and a new trial granted.

The other Justices concurred.

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D. T. Baldwin v. Adeline Talbot.

Delay in advertising execution sale—Levy upon entirety of mortgaged property.

Where a constable has levied execution under a justice's judgment, the rights acquired by the levy are not lost by his delay in advertising the sale of the property taken, if requested not to do so by a mortgagee who intends to replevy it, or by some one authorized to represent the mortgagee.

Delay in giving notice of an execution sale is prejudicial to the execution debtor if to any one, and may be such as to entitle him to apply for *mandamus* to compel the officer to proceed.

Where a constable levies a justice's execution upon mortgaged property, he must levy on the whole and sell it in one parcel subject to the mortgage; and if he does not find it all together, he must have time after levying on part to find and levy on the remainder, if within his bailiwick.

Error to Cass. Submitted April 6. Decided April 13.

Replevin. Defendant brings error. Reversed.

M. A. Thompson for plaintiff in error. An execution sale of mortgaged chattels must cover the whole property subject to the mortgage: *Worthington v. Hanna* 23 Mich. 530; *Harvey v. McAdams* 32 Mich. 477; notice of execution sale is for the benefit of the debtor, who may waive the statutory requirement of notice: *Munger v. Fletcher* 2 Vt. 524; *Shamburger v. Kennedy* 1 Dev. 1; failure to give the statutory notice of an execution sale will not invalidate it as against any purchaser who is not in fault: *Hobein v. Murphy* 20 Mo. 447; *Curd v. Lackland* 49 Mo. 451; *Wallace v. Trustees* 52 Ga. 164; *Wade v. Saunders* 10 N. C. 270; *Hanks v. Neal* 44 Miss. 212; *Thulemeyer v. Jones* 37

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Tex. 560; *Osgood v. Blackmore* 59 Ill. 261; *Meanor v. Hamilton* 27 Penn. St. 137; *Whitaker v. Sumner* 7 Pick. 551; *White v. Cronkhite* 35 Ind. 483; non-compliance by the sheriff with the statutory requirements in regard to the levy, advertisement of sale and sale of real estate is a mere irregularity which is waived if not complained of in good time: *Spafford v. Beach* 2 Doug. (Mich.) 150.

L. Burget Des Voignes for defendant in error.

MARSTON, C. J. We are of opinion that the court erred in the instructions given as to the delay of the constable in giving notice of sale under his execution.

An execution was issued by a justice of the peace and delivered to Baldwin, a constable, who on the 26th day of August, 1879, levied upon certain chattels as the property of the execution debtor C. Robert Talbot. It appeared upon the trial that the property levied upon with other property had previous to the levy been mortgaged by the execution debtor to his mother, the defendant in error. That on the day after the levy one Taylor, acting as her agent, made demand of the constable for the goods and chattels levied upon, and upon refusal to deliver, he on the 30th day of August sued out a writ of replevin, which was the commencement of the present action, and under which the property was taken by the sheriff on the second day of September following.

Several questions were raised on the trial. We shall, however, notice but one. The court in substance instructed the jury that the statute required the constable to immediately give public notice by advertisement of a sale under his execution levy; that "immediately" as used in the statute meant that he must use due diligence and give such notice as soon as he reasonably could under all the circumstances, and left the question to the jury as to whether the constable had proceeded with all due diligence.

The constable, to excuse the delay, showed that property other than what he levied upon was embraced in the mortgage, and that a portion of the same was within his

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bailiwick, and that he was endeavoring to find the same; also, that he delayed giving notice because of a conversation with Talbot, the execution debtor, who requested him not to give the notice and thus save expense, as the property would certainly be replevied by the mortgagee. The court had serious doubt as to the admissibility of the conversations between Talbot, the mortgagor, and the constable, as it was not shown that Talbot had authority to speak for the mortgagee.

We are of opinion that there was evidence tending to show that the constable had reason to believe that Mr. Talbot did represent his mother on that occasion. In so far as the rights of the execution creditor are concerned, if the constable had good reason to believe, and did believe, that Talbot did have authority to request delay, and that time was given in consequence thereof, the rights acquired under the levy would not be lost. There was, however, another good reason for the delay in this case. In so far as the mortgaged property was within the jurisdiction of the officer it was his duty to levy on the whole thereof and sell it in one parcel or lot subject to the mortgage, and after levying on a part thereof, a reasonable time must be given him to find the rest of the mortgaged property. As already intimated it is the execution debtor who is prejudiced by the delay if any one. The constable may willfully or negligently fail to perform his duty, and the circumstances may be such that the execution debtor would have a right to apply to a court of competent jurisdiction to compel the officer to proceed and execute his writ. We are not prepared to say that a failure by the officer for even an unreasonable time, to give the notice required by the statute, would operate to release the property levied upon, or enable a mortgagee thereof to obtain possession in an action of replevin. At all events, under the evidence we are of opinion the jury were not correctly instructed upon this part of the case.

The judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

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LOYAL E. KNAPPEN, RELATOR v. THE BOARD OF SUPERVISORS OF BARRY COUNTY.

Right of board of supervisors to reduce salary of prosecuting attorney.

Comp. L., § 535 empowered boards of supervisors to fix the compensation of the prosecuting attorney from time to time. Act 154 of 1879 provided that annual salaries should be fixed by the board on or before the 31st of October, before the officers' terms began, and should not be changed during the term. *Held*, that this would not prevent a board which had fixed a salary before Act 154 was passed, from changing it for the second year of the prosecuting attorney's term. Such a construction does not make the act retrospective.

The act of a board of supervisors in fixing the salary of a prosecuting attorney does not constitute a contract between the latter and the county; and where the Constitution does not prevent, the legislature can authorize the board to change the salary so far as it has not already been earned, even though a part of the official duties are duties to the state.

MANDAMUS. Submitted April 6. Denied April 13.

Loyal E. Knappen and *C. M. Knappen* for relator. A board of supervisors which has once legitimately exercised its authority to fix a salary for a definite period has exhausted its power and it cannot act upon the matter afterward: *People v. Supervisors* 35 Barb. 408; *People v. Ames* 19 How. Pr. 551; *Supervisor v. Birdsall* 4 Wend. 455; *Supervisors v. Briggs* 2 Den. 26; *Chase v. Saratoga* 33 Barb. 603; *Smith v. New York* 1 Hun 56: *Arthur v. Adam* 49 Miss. 404; the board is required to fix the salary of the prosecuting attorney: *People v. Macomb Supervisors* 3 Mich. 479; as to *status* of district attorneys as state officers, see *Fellows v. New York* 8 Hun 484; as to contract relations binding a county, see *McDaniel v. Yuba* 14 Cal. 444.

Sweezey, Niskern & Sweezey for respondent. The board of supervisors has exclusive authority to fix the salary of the prosecuting attorney: Const. Art. x, § 10; *People v.*

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Macomb Supervisors 3 Mich. 475; *People v. Wayne Auditors* 13 Mich. 233; it may act within its jurisdiction as the Legislature acts for the State: *Hotchkiss v. Supervisors* 65 N. Y. 225; ordinances fixing salaries are not contracts with the officers: *Baker v. Pittsburgh* 4 Penn. St. 49; *Conner v. Mayor* 5 N. Y. 285; *Madison v. Kelso* 32 Ind. 79; a municipal corporation, unless restrained by the charter, or unless the employment is in the nature of contract, may reduce or otherwise regulate the salaries and fees of officers: 1 Dill. Mun. Corp. § 170; *Warner v. County* 2 Den. 272; *Smith v. County* 2 Pars. (Pa.) 292; *Iowa City v. Foster* 10 Ia. 189.

COOLEY, J. The relator was prosecuting attorney for the county of Barry, for the years 1879 and 1880, having been elected at the general election of 1878. At the October session of the board of supervisors for the year 1878 the salary of this office was fixed at seven hundred dollars. This was done under section 535 of the Compiled Laws, which provided that "the prosecuting attorneys shall severally receive such compensation for their services as the board of supervisors of the proper county shall, by an annual salary or otherwise, from time to time, order and direct." In their action the board did not declare the length of time the salary should stand thus fixed, but it had been customary to fix it annually.

In 1879 the Legislature enacted "That the annual salaries of all salaried county officers, which are now or may be hereafter by law fixed by the board of supervisors, shall be fixed by said board on or before the 31st day of October prior to the commencement of the term of such officers, and the same shall not be increased or diminished during the term for which such officers shall have been elected or appointed." Pub. Acts, 1879, p. 148. If this act was applicable to the cases of those then in office, it would not have been competent for the board again to fix the salary for the office in question previous to their October session, 1880. The board nevertheless, in October, 1879, assumed to act upon the subject and to increase the salary by $100, but at an adjourned

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meeting in January this action was rescinded. The questions arising on this application are: *First*, whether the board had any power to act upon the subject in 1879, and if so, then *second*, whether the action taken in that year was not conclusive.

It is insisted on behalf of the relator that the act of 1879 was not intended to apply to the cases of incumbents, but was plainly meant for the cases of subsequent appointments and elections, and that its operation is retrospective if applied otherwise. Reliance is then placed upon the general principle that statutes shall not be given a retrospective operation unless their terms plainly require it: *Harrison v. Metz* 17 Mich. 377; *Clark v. Hall* 19 Mich. 356. But we do not think the act of 1879, if applied to the case, is in any sense retrospective. The salary was then fixed only for the time being, and the board at discretion might change it; and the only effect of the statute would be to take away the power to fix "from time to time" and require it to be done once for all, for the whole term. There is no doubt whatever of the power of the Legislature to do this. The fixing of a salary does not constitute a contract between the county and its officer; and the legislative authority is ample so far as salary is not already earned by the performance of services, except when otherwise provided by the Constitution: *Butler v. Pennsylvania* 10 How. 402, 416; *Conner v. New York* 2 Sandf. 355, 369; s. c. 5 N. Y. 285. Nor does it make any difference that a part of the duties of the office are duties to the State rather than to the county; the county authority having been given full power in respect to compensation.

We are of opinion that the Legislature intended the act to apply at once, as soon as it should become a law. No doubt it is open to a different construction, but this seems to us the one that is most natural, and there is no impolicy and no injustice in the act thus applied that should make us hesitate in accepting it.

The conclusion is that the writ prayed for must be denied.

The other Justices concurred.

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Henry Whelpley v. Ira D. Nash.

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Action on justice's judgment—Excessive costs—Interest—Irregularities—Waiver by pleading.

Where a declaration in justice's court is good in substance, and defendant is present and pleads to the merits, he waives any objection on the ground of its being too general.

A justice's neglect to record in his docket the place to which a case is adjourned, is a clerical irregularity for which judgment cannot be reversed if the defendant is not misled and appears and answers.

Costs when made up are an incident of the judgment, but are not so inseparable from the damages as to invalidate a justice's judgment therefor, when excessive. Comp. L. § 5479.

In an action on a justice's judgment the damages may be counted on alone if the award of costs is excessive and illegal.

Where excessive costs have been awarded by a justice in giving judgment, and the judgment debtor does not appeal, the party recovering judgment is entitled to rectify the error by remitting the costs and suing again upon the judgment for damages.

Interest may be reckoned on a judgment for costs when affirmed on *certiorari*. Comp. L., § 1635.

Error to Van Buren. Submitted Apr. 6. Decided Apr. 13.

Assumpsit. Defendant brings error. Affirmed.

Mills, Crane & Hilton for plaintiff in error.

Chandler Richards for defendant in error. The declaration was sufficient if not demurred to: *Hurtford v. Holmes* 3 Mich. 460; *Comstock v. Howd* 15 Mich. 237; *Daniels v. Clegg* 28 Mich. 32; *Smoke v. Jones* 35 Mich. 409; *Smith v. Dodge* 37 Mich. 354; *Bradshaw v. McLoughlin* 39 Mich. 480; *Norton v. Colgrove* 41 Mich. 544; *Eddy v. Manshaun* 42 Mich. 532; *Smith v. Hobart* 43 Mich. 465; *Wilcox v. Tol. & A. A. R. R.* 43 Mich. 584: 45 Mich. 280; *Snyder v. Winsor* 44 Mich. 140; *Preston v. People* 45 Mich. 486.

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GRAVES, J. Nash, having recovered before a justice of the peace, sued the judgment over before another justice who gave judgment in his favor, and Whelpley took the cause by *certiorari* to the circuit court, where the determination made by the justice was affirmed. Whelpley brought error.

Complaint is made that the declaration was too general. We are inclined to think it was sufficient, but, admitting that it lacked legal certainty, the objection is unwarranted. The defendant was present and pleaded to the merits without suggesting any dissatisfaction with the declaration, and, as we are satisfied it is good in substance, there is no ground of complaint that has not been waived.

In recording an adjournment the justice neglected to state to what place it was made. This irregularity in the entry worked no prejudice to defendant. He was not misinformed or misled. He appeared in person and answered. The defect was a clerical mistake which harmed no one. The statute forbids reversals for such causes. Comp. L. § 5477.

The original judgment which was sued over was given for $79.80 damages and $24.56 costs. The allowance for costs was excessive and illegal, and Nash desired to remit them, and his object in suing the judgment over was to effectuate this purpose and eliminate the unauthorized allowance. This was made a matter of proof before the justice. The judgment in respect to damages was perfectly correct. The fault was confined to the award of costs and Whelpley made no attempt to have the error corrected. The case was allowed to stand without appeal or *certiorari*.

It is first objected that the judgment for damages and the award of costs were an entirety and that the excessiveness of the costs caused the whole recovery to be illegal. No doubt the costs when made up are an incident of the judgment (*Saunders v. Tioga Manuf'g Co.* 27 Mich. 520), but they are not inseparably blended with the damages, and in case they exceed legal limits they do not necessarily infect with illegality that part of the recovery applicable to damages. The statute which says the judgment shall not be reversed "on account of any fees having been improperly allowed" by the justice, sufficiently implies that an award of costs

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beyond what the law authorizes will not necessarily invalidate the entire recovery. Comp. L. § 5479. When the damages have been legally adjudged they may be distinguished and counted on, notwithstanding that the costs set down with them are illegal and must be rejected.

It is next contended that if the original judgment was a good one for the damages, there was no occasion to sue it over and cause further costs, since an execution might have been issued without including costs. The point is without merit. On rendering the second judgment the justice excluded the entire costs of the first. He included the damages only of the first judgment and then added the bare costs of the suit before himself. By such means Nash was enabled to remit the whole costs of the first cause, and reduce his recovery to proper form, and this was correct. He was not bound to let the judgment stand uncorrected and submit to whatever difficulties and embarrassments might arise from the error in regard to costs. He was entitled to have it brought into such shape as to afford the regular remedies for collection either through execution from the justice or a certified transcript entered up in the circuit court. Whether collection might not have been practicable without suing the judgment over is not material. There was "good cause" and that is sufficient. Comp. L. § 5376.

It is made a point that in affirming the judgment, the circuit court allowed interest on the costs before the justice. The statute gives interest on all judgments at law for the recovery of money (Comp. L. § 1635), and the practice has been constant under it to reckon interest on the costs in case of affirmance on *certiorari*. The legal costs before the justice have been treated invariably as a branch of the judgment for the purpose of interest, and there is no propriety in going behind this practical construction. Had the Legislature deemed it an improper one they would have interposed and corrected it long ago. There is nothing else worthy of notice.

The judgment is affirmed with costs.

The other Justices concurred

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JOHN M. CONWAY, RELATOR v. IONIA CIRCUIT JUDGE.

Garnishment—Defective affidavit—Dismissal of proceeding.

Where proceedings in garnishment are based upon an affidavit that is jurisdictionally defective, but the garnishee appears and discloses assigned claims in which he has no personal interest, it is within the court's discretion to dismiss the proceedings on motion made by the garnishee, before judgment is entered in the principal case, especially if the affidavit is not amended after notice to dismiss, and the garnishee's conduct has not caused prejudice.

An affidavit for a writ of garnishment is fatally defective if it does not show the nature of the contract by which the principal defendant is bound or identify it with the cause of action in suit.

A garnishee who has only disclosed claims of creditors held under assignment wherein he has no personal interest, can be held only upon the trial of an issue, which is not ripe for trial before judgment in the principal case.

MANDAMUS. Submitted April 6. Denied April 13.

Donald McPherson and *Samuel Clute* for relator.

Blanchard, Bell & Cagwin for respondent. Affidavits in garnishment are bad if they do not connect the indebtedness with the action or with a contract: Act 256 of 1879; *Weimeister v. Manville* 44 Mich. 408.

CAMPBELL, J. A *mandamus* is asked to rescind an order dismissing garnishee proceedings as founded on a defective affidavit. The affidavit does not conform to the amended garnishee law of 1879 inasmuch as it fails to show the nature of the contract of the principal defendants, or to identify it with the cause of action in suit. As we have repeatedly held the defects fatal we need not discuss it.

But it is claimed the garnishee waived the jurisdictional defect by appearing and disclosing. He expressly denied having any property of the principal debtors, and his disclosure showed claims of creditors under an assignment, in

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which he had no personal interest, and in which other persons had. The motion to quash was entered before any judgment had been rendered against the principal defendants.

Without considering under what circumstances, if at all, a waiver will preclude the garnishee from raising such objections, we do not think it was any abuse of discretion in the circuit court to relieve the garnishee from further responsibility. There seems to have been no difficulty in the way of making a valid affidavit when the motion was noticed, and whatever may have been the case on this point, the garnishee should not be deprived of his jurisdictional defence, and be made to bear the annoyance of a litigation in which he has no interest, unless his conduct has been such as to work serious prejudice. In the present case if the principal defendants had not withdrawn their defence the judgment against them must have been still further delayed, and, as already stated, the garnishee had made no admissions whatever of liability. He could only have been held upon the trial of an issue, which was not ripe for trial before judgment in the principal case.

The *mandamus* must be denied with costs.

The other Justices concurred.

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CHARLES F. BROWN v. OSHEA G. DUNCKEL.

Satisfaction of one mortgage by giving another.

A debtor gave a note for his indebtedness and a chattel mortgage upon his horse. The indebtedness increased and he gave another mortgage upon other property. Meanwhile he sold the horse. Afterwards his creditor expressed the opinion that the mortgages had become void, and asked for a new mortgage on the same and other property. When this was given the original note was surrendered. The debtor objected to including the horse in the latest mortgage, claiming that he understood that mortgage was taken in place of the others, but the agent for the creditor insisted and he included it. The agent afterwards took the horse on the first and third mortgages, and the purchaser brought replevin for it. *Held* that it could not be said that the court erred in so instructing the jury as to leave them to.

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decide whether the giving of the new mortgage and the surrender of the note were meant to operate as payment of the original mortgage, especially as the bill of exceptions did not contain all the testimony, and there might have been other evidence to support the charge delivered.

The giving of a note and mortgage for a previous debt do not, as matter of law, discharge the debt unless it is so agreed or understood.

But where the evidences of the previous debt are surrendered when new securities are taken, this is *prima facie* evidence of satisfaction, but not conclusive.

Error to Ingham. Submitted April 7. Decided April 13.

REPLEVIN. Defendant brings error. Affirmed

L. A. Smith for plaintiff in error.

Cruickshank & Warren for defendant in error. Surrender of the evidence of a debt strongly indicates payment: *Whitteraby v. Mann* 11 Johns. 576; *Johnson v. Weed* 9 Johns. 310; *Sage v. Walker* 12 Mich. 425; *Gardner v. Gorham* 1 Doug. (Mich.) 507; *Hotchin v. Secor* 8 Mich. 494; *Sears v. Smith* 2 Mich. 243; *Burchard v. Frazer* 23 Mich. 224.

COOLEY, J. This case began in justice's court where Dunckel replevied from Brown a horse which he claimed as owner. Brown defended in the right of Roehm & Davison for whom he was agent. Upon trial on appeal in the circuit court it was shown that one Malone was formerly the owner of the horse; that on April 20, 1879, Malone was indebted to Roehm & Davison, and gave them his promissory note for $200, payable with interest six months from date; that on November 21, 1879, this note remained unpaid and Malone was also indebted to Roehm & Davison on account; the sum with the amount of the note being in all about $375; that to secure the payment of the whole sum Malone on that day gave to the creditors a chattel mortgage upon the horse and other property, the condition of the mortgage being that the indebtedness with interest should be paid on the 20th of March, 1880; that the dealings between the parties continued and the indebtedness increased until March

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29, 1880, when Malone gave the creditors a second mortgage on other property for further security; that in May following the indebtedness was still unpaid, and Malone went to Detroit to see the creditors, and in a conversation with Davison the latter expressed the opinion that the mortgages had become worthless and void, and he desired Malone to give a new mortgage on the same and other property. This Malone at first objected to, but the new mortgage was finally given on June 9th following.

Previous to this transaction, and in February, 1880, Dunckel had bought the horse of Malone with knowledge of the mortgage. No question is made in this case of his right to the horse unless it is still subject to the mortgage lien. Whether it is or not depends upon the circumstances attending the giving of the third mortgage. It was testified by Malone that Brown, as agent for the creditors, called upon him to take the new mortgage; that the amount then due was $594.91, and for this sum a note was given and also a mortgage on the horse and other property, to secure the payment within thirty days. Brown then, as agent for Roehm & Davison, receipted the account as paid by note, and the first note was surrendered to Malone. The witness also further testified "that at the time he gave said last mortgage he desired said Brown to release said horse from said first mortgage because he had sold said horse to Dunckel and received his pay, and that said Brown refused so to do, and told him that he did not purpose to release anything. That said Brown required him to include said horse in the third mortgage, and threatened to take it on the first unless he did so, but without assigning any reason why he so desired it included in said last mortgage." Also "that he understood, and thought Brown also understood, that said last mortgage was to be received by Roehm & Davison in the place and stead of the first two." Brown was also sworn as a witness, and testified that he took possession of the horse under the first and third mortgages.

It was contended before the jury by Dunckel that the demands for which the first mortgage was given were

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discharged when the third mortgage was given, and the case was made to turn upon that claim. In the instructions to the jury by the trial judge occur the following passages, all of which were excepted to: "My attention has been called to the circumstance that the $200 note and the account for which the first mortgage was given were surrendered. Now upon that subject I must say, that is certainly a very important circumstance; a very important circumstance. I cannot say as a matter of law it is decisive, but the surrender of the evidence of the debt for which the first mortgage was security, certainly the significance of the circumstance tended strongly to show what the intention of the parties was, but it is to be considered in connection with all the other circumstances in the case, from which you must determine as best you can whether the parties intended that the first mortgage should survive the last one or not. It is not necessary to prove a special and direct agreement between the parties that the giving of a new note for an old one should operate as payment of the old one, but that may be determined by the circumstances and actions of the parties." The judge also instructed the jury in response to requests, that the giving of a new note for the amount due on a former which is surrendered up will operate as payment of the old note if the parties so intended it, but the surrender of the note is not entirely conclusive upon that question. It may be explained and shown, notwithstanding, that the parties really intended only to take an additional security without canceling the old indebtedness. Also that the possession of the old note and account receipted by Malone is *prima facie* evidence that it was given up upon its payment, but this is a circumstance that may be explained. Also that the giving of a note for the debt did not as matter of law operate as payment of the debt unless it was so expressly agreed, but it should be understood to be so expressly agreed if the jury could ascertain from the facts and circumstances that it was so mutually understood between the parties. The jury returned their verdict for the plaintiff.

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The instructions given were in accordance with the rulings in *Hotchin v. Secor* 8 Mich. 494; *Sage v. Walker* 12 Mich. 425, and *Burchard v. Frazer* 23 Mich. 224, and were correct if there was evidence in the case to justify them. We have recited the most important evidence so far as it is given in the bill of exceptions, and cannot say the instructions were wholly unwarranted. The testimony of Malone and Brown tends strongly to show that the pre-existing indebtedness was not understood to be satisfied when the third mortgage was given, but it was not conclusive. The bill of exceptions does not purport to contain all the evidence, and there may have been proofs of a tendency equally strong the other way.

On the whole we cannot say that any error was committed, and the judgment must be affirmed with costs.

The other Justices concurred.

Allen Crittenden, administrator of the estate of Frederick Basom v. Albert Basom et al.

Payment of demands against estate—Bill to set aside previous conveyances.

A bill filed by an administrator to subject property once owned by his intestate to the payment of demands against the estate, will not lie where the bill itself tends to show that the property was disposed of without fraud as against creditors; as where deeds were given in escrow for the purpose of distributing the property among the grantor's heirs without will or administration, and with the reservation of a power to destroy the papers at any time.

Appeal from Washtenaw. Submitted April 7. Decided April 13.

Bill to obtain release of deeds. Dismissed on demurrer. Complainant appeals. Affirmed.

Joslin & Whitman for complainant. The conveyances which complainant prays may be released are void as against

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creditors, and may be set aside under Comp. L. § 4416: *Norton v. Norton* (1850) 5 Cush. 524; *Chase v. Redding* (1859) 13 Gray 418; *Wall v. Prov. Inst.* (1863) 6 Allen 320; *Parker v. Flagg* (1878) 127 Mass. 28.

Bradley F. Granger for defendants. Where a grantor directs that the deed be kept in escrow until after his death and then be delivered to the grantee, the estate vests in the grantee from the time of its execution: *Foster v. Mansfield* 3 Met. 412; if he delivers it in trust to be delivered after his death, unless he directs otherwise, and he gives no other directions, it takes effect at his death as from the date of delivery: *Morse v. Slason* 13 Vt. 296.

GRAVES, J. The complainant filed this bill in his character of administrator in order to subject certain real property which his intestate once owned to the payment of demands against the estate, and the court below dismissed it on demurrer. The right to file such a bill is rested solely on the statute which enables an administrator in case of deficiency of assets to sue in chancery to recover rights or interests in real estate which the deceased shall in his lifetime have conveyed with intent to defraud his creditors or to avoid some right, debt or duty, or where the transfer is in law void as against creditors. Comp. L. §§ 4416, 4417.

But this bill fails to state any case within the contemplation of the statute, and not only so, it presents a state of things tending to negative the existence of such a case. Several conveyances made just before the death of the intestate, and several other connected transactions, are set forth and explained. But there is no pretense of any fraud, nor any charge or suggestion impeaching good faith. On the contrary the bill expounds and construes the transaction in this manner:

"That all of said deeds of conveyance hereinbefore mentioned as executed and acknowledged by said Frederick Basom were made for the purpose of distributing his estate among his heirs without the aid of the probate court, and as and for or in lieu of a distribution thereof by will; and

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that none of said deeds were to be delivered or recorded before the death of said Frederick; that said Frederick, at the times respectively of the execution of the same, placed said deeds in the hands of your orator for safe-keeping, but at all times retained the control and direction of them, and the full right and power to destroy any or all of them at any time, excepting perhaps the deed mentioned in paragraph 11 (being a transfer running to his son William S. Basom) for which in his life-time said Frederick received a consideration as aforesaid, and that the same mortgages and notes specified in paragraphs 17 and 18 (being papers executed by those named as grantees in certain deeds and made to carry out arrangements of which the deeds were parts) were placed in the hands of your orator expressly subject to destruction with the deed to said William specified in paragraph 15, by said Frederick at any time that he might see fit, and that said mortgages and said notes were not to be and, in fact, were not delivered to the said George and the said Rufus or either of them until after the death of said Frederick."

It is very plain that the bill cannot be supported.

The decree is affirmed with costs.

The other Justices concurred.

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Robert Maxwell v. James Deens.

Special appeal—Justice's return—Waiver of defects by going to trial—Affidavit for arrest for trespass on lands.

On special appeal from a justice errors will not be reviewed that do not involve some decision, either express or implied in the exercise of jurisdiction. Comp. L. § 5432.

A justice's return to a special appeal is assumed to contain all that took place before him; if defective, a farther return should be required, and if a party goes to hearing upon it without objection, he is presumed to have none.

One who joins issue, and goes to hearing on the merits, is generally understood to waive objections to the process which he does not distinctly make known.

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A person arrested on justice's warrant, for trespass on land, made no objection to the sufficiency of the affidavit on which the warrant was issued, nor to the regularity of his arrest, but pleaded the general issue with notice that the land was his own freehold, and went to trial. *Held*, that he could not, on special appeal, object for the first time to the sufficiency of the affidavit, even though no right of arrest could be founded on it.

The fact that an affidavit for the arrest of a trespasser on land is defective, does not affect the issue on the merits.

An affidavit for the arrest of a trespasser, does not state the necessary facts if it is made by an agent and merely sets forth that his principal has a good cause of action, as deponent verily believes, against defendant, against whom he applies for process of warrant in behalf of his principal for trespassing on the latter's lands.

Error to Bay. Submitted April 7. Decided April 13.

TRESPASS. Plaintiff brings error. Reversed.

A. C. Maxwell for plaintiff in error. Defects in an affidavit or warrant for arrest for trespass on lands are waived by pleading the general issue, giving notice of special matter and going to trial on the merits: *Hart v. Blake* 31 Mich. 278; *Manhard v. Schott* 37 Mich. 234; *Stewart v. Hill* 1 Mich. 265.

Gilbert & McCormick and *Frank S. Pratt* for defendant in error. The affidavit for the arrest was fatally defective: *Hackett v. Wayne Circuit Judge* 36 Mich. 334; *Brown v. Kelley* 20 Mich. 27; putting in special bail and pleading do not waive jurisdictional defects in an affidavit for arrest: *In re Stephenson* 32 Mich. 61.

CAMPBELL, J. In this case a suit was brought in a justice's court for trespass on lands, and the defendant Deens was arrested on a warrant.

Plaintiff declared in trespass for damage to the land, and defendant, appearing by attorney, put in the general issue with notice that it was his own close and freehold. He made no claim and filed no bond to transfer the cause to the circuit, and a trial was had and damages were recovered against him.

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He then took a special appeal, alleging as special grounds the insufficiency of the affidavit on which the warrant issued, and error in the decision by the justice that the affidavit was in accordance with law. The circuit court of Bay county reversed the judgment on this ground.

Upon examining the justice's return as appearing in the record in this court it does not appear that the defendant ever objected before the justice to the sufficiency of the affidavit or to the regularity of his arrest. No motion or objection of any kind, or for any purpose, was made before the magistrate, and the only action he took was in trying the issue raised by the pleadings.

The statute concerning special appeals does not contemplate the review by the circuit court of errors which do not involve some decision by the justice, either express, or implied in the exercise of jurisdiction. Comp. L. § 5432.

We must assume that the justice's return contains all that occurred before him. If defective a further return should have been required. By going to hearing on it the party signifies that he is content with it. *Case v. Frey*, 24 Mich. 251.

The general rule is that a party who joins issue and goes to a hearing on the merits, waives objections to the process, unless he distinctly makes them known in some way. While much allowance is made in favor of parties under arrest, and a waiver of objections will not be hastily assumed, yet it would be dangerous and misleading for a party to lie by indefinitely and submit himself without some kind of protest to a trial on the merits, and then rely on an objection that he has a right to waive if he chooses. Moreover the affidavit setting up grounds of appeal rests on an alleged decision of the justice which we must assume on this record was never made. We think the defect in the affidavit was waived by going to trial and judgment, without at any stage of the cause bringing the matter to the attention of the justice. *Hart v. Blake* 31 Mich. 278; *Manhard v. Schott* 37 Mich. 234; *Gott v. Brigham* 41 Mich. 227.

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In holding this we do not hold that the consequence would be to maintain any right of arrest now or hereafter founded on the affidavit. That is only one means of enforcing the judgment, and depends on matters collateral to the issue on the merits. The affidavit in this case* contains no facts whatever and the circuit court was clearly right in so holding. But as already suggested, we do not think this affects the issue on the merits.

The judgment dismissing the case must be reversed with costs, and the cause remanded for trial.

The other Justices concurred.

GEORGE W. MANN v. WHITE RIVER LOG & BOOMING CO.

A log-driving company is not a common carrier.

A common carrier's liability does not attach to a log-driving company for failure to deliver part of a quantity of logs received by it to be driven to their destination.

Error to Muskegon. Submitted Apr. 7. Decided Apr. 13.

ASSUMPSIT on common and special counts. Plaintiff brings error. Affirmed.

F. W. Cook for plaintiff in error.

Frank Bracelin and *Norris & Uhl* for defendant in error. Log-driving companies are not insurers of the logs

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*State of Michigan, County of Bay, ss.

Andrew C. Maxwell being duly sworn deposes and says that he is agent for Robert Maxwell, and makes this affidavit in his behalf. Deponent further says that said Robert Maxwell has a good cause of action as deponent verily believes against James Deens, against whom deponent applies for process of warrant, in behalf of said Robert Maxwell for trespassing on the lands of said Robert Maxwell in Bangor in said county, to an amount not exceeding one hundred dollars, and that he has full knowledge of the facts here set forth, and further says not.

ANDREW C. MAXWELL.

Sworn and subscribed before me this 6th day of May, 1880.

DANIEL MANGAN,
Justice of the Peace.

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nor responsible as common carriers: *Wilcox v. Muskegon Booming Company:* Per Withey J., U. S. circuit court for the Western District of Michigan.

CAMPBELL, J. Plaintiff sued defendant for not delivering part of a quantity of logs which the company had in charge to deliver at White Lake, after running them down from their place of reception on White river. As the case was passed upon by the jury they necessarily found that there had been no fault or negligence in defendant, and the only question before us is whether defendant was a common carrier, and liable at all events, except for the risks of a public enemy or inevitable casualty.

The duty undertaken by the defendant was in accordance with its stautory power to drive, run, raft and boom logs in White river for any person having logs to float down the stream, and the case shows that the work of all kinds was done at regular rates, and for all alike.

The dispute, therefore, is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage.

It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. Comp. L. § 2788. The statute moreover gives a special remedy to enforce the lien. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for.

These rights resemble in important respects the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.

When we look at the business done, it will be found to resemble in some respects the business of carriage, and in some respects it is like different business, while in most things it is peculiar and subject to its own conditions. It

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has one peculiarity in which it differs entirely from common carriage, which was held by this court in *Fitch v. Newberry*, 1 Doug. 1, to create no rights against property not voluntarily entrusted to the carrier. One important part of the compensated business of these companies includes the temporary control of logs interfering with the free running of the body of logs in the stream. Comp. L. § 2793.

The peculiarity which is most apparent is that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as they were in the present case, set floating promiscuously, and only sorted and separated when the run is as to some portion at least substantially completed. The logs are floated down the streams by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and obstruct the floatage. And it is to prevent this that the compulsory powers are exercised.

It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we cannot always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness.

Taking heed to give no excessive force to resemblances,

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we may find, nevertheless, some other duties which are at least quite as analogous as carriage. Drovers—or as the common law calls them, agisters—perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers. Angell on Carriers, §§ 24, 52; Story on Bailments, § 443. The entire absence of any motive power, and the function of guiding and regulating things which move themselves or are moved by some independent force, make it impossible to treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage.

There is always hardship and often wrong in holding persons liable for what they have done their best to avoid. While we are bound to respect established rules, we cannot wisely extend them beyond their reasonable application. We think the court below decided correctly that the extreme liabilities of common carriers did not apply to defendants.

The judgment must be affirmed with costs.

The other Justices concurred.

This case is reported in 20 American Law Register (N. S.), 734, with a note by M. D. Ewell, defining common carriage and expressing the opinion that the case is one of first impression; also in 12 Central Law Journal, 423, with a note by this Reporter suggesting an analogy between log-driving and the business of towing, and inferring the applicability of similar legal principles.

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WILLIAM THOMPSON v. GRACIE MOILES.

Evidence of value—Damages for removing timber.

Witnesses as to value can base their opinions on actual sales of which they have knowledge, but can hardly be cross-examined as to what they have offered to sell similar property for.

In an action for trespass *quare clausum* for entering land and cutting timber it is correct to charge that if the value of the timber cut covered the damage thereby done the land, that should be the basis of the verdict, but if not, it should be the damage done the land by the cutting and removal of the timber.

Where a person cuts timber in good faith, believing that he has a right to, the measure of damages is the difference between the values of the land with the timber standing, and with the timber removed; or it is the amount of injury caused by defendant's going on the land and cutting and removing the timber as a continuous act. And the increased value of the trees, caused by defendant in converting them into logs, should not be included.

Error to Saginaw. Submitted April 6. Decided April 13.

TRESPASS *qu. cl.* Defendant brings error. Affirmed.

Dan. P. Foote and *Benton Hanchett* for plaintiff in error. The measure of damages for the wrongful removal of timber in good faith is the difference between the value of the land before and after the timber is cut: *Argotsinger v. Vines* N. Y. Ct. of App: 22 Alb. L. J. 415; *Chipman v. Hibberd*, 6 Cal. 162; and the increased value of the timber by reason of defendant's labor, should not be included: *Foote v. Merrill* 54 N. H. 490: 20 Amer. 151; the measure of damages is held to be the value of the stumpage in *Single v. Schneider* 30 Wis. 570; *United States v. Magoon* 3 McL. 171; *Goller v. Fett* 30 Cal. 482; but in trover for wilful conversion the measure has been held to be the value at the place of conversion: *Symes v. Oliver* 13 Mich. 9; *Final v. Backus* 18 Mich. 218; *Grant v. Smith* 26 Mich. 201.

Edget & Brooks for defendant in error.

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MARSTON, C. J. This was an action of trespass *qu. cl.* It appears that Thompson in the winter of 1879 cut a number of pine trees standing upon a certain piece of land owned by the plaintiff, and it was admitted that the defendant acted in good faith in cutting and removing the timber.

Henry Moiles, the husband of plaintiff, was examined as a witness in her behalf. On the direct examination he gave no evidence as to the value of the timber cut or injury to the land, because he did not know the quantity or value of the timber cut and removed. On cross-examination defendant's counsel sought to show by this witness that the same winter he sold timber of the same kind and quality, taken from off an adjoining section and near to the lands upon which the trespass was committed, and then asked the witness at what price he sold or offered to sell such timber. This was objected to and the objection sustained.

We are not satisfied that the defendant below was injured by this ruling. It was not a sale of the timber in question. It was in fact but an offer to sell other timber of like kind and quality. Witnesses called to fix values have a right to give their opinion based upon actual sales known by them to have been made, but we think it would be going too far to hold that the court erred in rejecting an offer to prove a mere proposition to sell property similar to that in dispute to fix the value.

The only other question raised which we deem it necessary to consider relates to the charge of the court touching the measure of damages. There is no doubt but that the request* made by counsel for defendant upon this part of

*Defendant requested the court to charge the jury as follows:

"This is an action of trespass to land, brought by the plaintiff to recover from the defendant damages to her land caused by his going upon it, and cutting down and carrying away certain pine trees. It is conceded by the plaintiff that defendant acted in good faith, believing that he had a right to cut and remove those trees, and admitted by the defendant that he was mistaken and that he had no such right; this being so the measure of damages will be the difference in value of the land with the timber standing on it, and its value after it was cut, and the timber removed. In other words, the measure of damages is the amount of injury to the plaintiff's land by reason of the defendant going upon it, and cutting and removing the trees as a continuous act, and the increased

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the case was correct, and we also think that the court, in the first instance, did not give the same even in substance. But upon the attention of the court being called thereto, further instructions were given, and directed the jury to determine whether the value of the timber cut covered the damage done to the land by the cutting thereof. If so, that should be the basis of their verdict, but if not, then to fix the amount at the damage done the land by the cutting and removal of the timber. This we think was substantially what counsel had requested, and the jury could not have misunderstood the measure here given them.

We discover no error and the judgment will be affirmed with costs.

The other Justices concurred.

GURDON CORNING v. HENRY WOODIN.

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Trial—Prejudicing jury—Tacit allowance of irregularities.

It is error to permit the charge and verdict in an action of trover to be read in the hearing of the jury on the trial of an action of replevin between the same parties as bearing on the subject matter.

The omission to rule expressly upon objections to injurious irregularities committed at a trial, will not protect them from review; the judge's silence may be construed as allowing them against objection.

Error to Isabella. Submitted April 7. Decided April 13.

REPLEVIN. Plaintiff brings error. Reversed.

Brown & Leaton and *Hanchett & Stark* for plaintiff in error. It is prejudicial error to use the charge in one court before the jury in another where the same subject matter is

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value of the trees occasioned by the labor of defendant, converting them into logs, is not to be included."

Which request the said circuit judge refused to give, to which refusal the defendant then and there excepted.

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in litigation: *Scripps v. Reilly* 35 Mich. 387: 38 Mich. 15; *Brown v. Swineford* 44 Wis. 282; *Cable v. Cable* 28 Amer. 338.

Wisner & Draper for defendant in error.

GRAVES, J. This case is in an awkward shape and must be briefly disposed of. It appears that Corning brought replevin for a quantity of logs which had been cut by Woodin on Corning's land. Neither Corning's ownership of the land, nor the fact of cutting by Woodin, was controverted. But Woodin claimed that he did the cutting under an oral sale to him by Corning, which amounted to a license. This sale was denied by Corning, and whether one was made or not, was the important question of fact in the cause. The evidence in regard to it was conflicting. The jury found against the plaintiff.

In the course of the trial the defendant's counsel stated in substance before the court and jury that in a previous case of trover between the parties the question whether such a contract of sale was actually made was distinctly in issue and decided as now contended by defendant, and that the deliberate decision of the jury then made ought to settle the present case in defendant's favor, and on the close of the evidence he produced the charge delivered in the case referred to and read it to the court in the presence and hearing of the jury.

These proceedings were objected to by plaintiff's counsel, but the judge refrained from interference and remained silent. He neither announced a ruling on the objection, nor expressed any disapprobation of the practice of defendant's counsel, and the jury must have inferred that it had the judge's approval. No other view was possible.

The whole proceedings were improper.

It is now said that as there was no declared ruling there is no foundation for the charge of error. No doubt it was the judge's duty to interpose without waiting to be moved thereto by plaintiff's counsel; but the objection taken was an explicit call upon him to do so, and his omission to state any opinion

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cannot be set up as a bar against revision of the proceedings. Injurious irregularities at the trial cannot be protected against review in an appellate court, by the judge's refusal to make express rulings on objections properly made against them. Were it otherwise it would be in his power to stifle the right to a revision in many cases.

The proper view of the present record is to construe the judge's silence as an actual permission and allowance of what was objected to. Some attempt was made by defendant's counsel to avert the effect, but we are satisfied, on careful examination of the whole case and especially on consideration of other parts of his address to the jury, that the influence was not wholly dissipated.

As there must be a new trial on account of the practice mentioned it is hardly expedient to consider anything further. The state of facts next time may be quite different.

The judgment is reversed with costs and a new trial granted.

The other Justices concurred.

ANNA M. WOHLSCHEID v. THEODORE BERGRATH, JOHN KOSTER, MICHAEL SPITZLEY, INNOCENCE TRIERWEILER ET AL.

Guardian's sale without ward's authority—claim invalid as to minor heirs—Statutes—time of taking effect—Costs on reducing decrees.

It is fraud in law, whatever the intent, for a guardian to petition in a ward's name, without the latter's authority, for leave to sell lands for the payment of claims against the estate of the ward's ancestor; and to include an invalid claim; and to represent the sale, when made, as a cash sale, when no cash is paid.

Comp. L. § 4837, providing for the termination of guardianship by the marriage of a female ward, was amended by Act 2 of 1877, which provided that the marriage should not affect guardianship so far as property was concerned. *Held*, that as a law does not take effect until ninety days after the close of the legislative session unless otherwise provided, the amendment did not apply to a case where the ward was married just before the Act passed.

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A personal claim that has not been allowed against an estate is not valid as against infant heirs.

Costs may be allowed complainant on appeal, even though the decree is modified in favor of the appellant, if the latter's defence shows no willingness to do justice.

Appeal from Clinton. Submitted Apr. 8. Decided Apr. 13.

BILL to set aside guardian's deed. Defendants appeal. Affirmed.

Cook & Merrill and *S. B. Daboll* for complainant.

J. H. Fedewa for defendants.

CAMPBELL, J. Complainant, who is the wife of Nicholas Wohlscheid and an heir at law of John Trierweiler, deceased, filed her bill in this case to avoid a guardian's sale made by Bergrath to Koster, and a mortgage made by Koster to Spitzley on forty acres of land in which she was interested as such heir.

The father died in 1868 leaving a widow, Elizabeth, and four minor children, being the complainant and the defendants Michael, Innocence, and Catherine, who are still infants. No administration was taken out on his estate, which consisted of some personal property and one hundred and sixty acres of land. In 1869 the widow married defendant, John Koster, and Bergrath, who is her father, was appointed guardian of the children, and as such leased the land to Koster for nine years, on the terms of paying $95.50 annually as interest on a mortgage to Bergrath, and all taxes on the land, and supporting, clothing and schooling the children.

Bergrath claims that he owned a mortgage for $1000 on a part of this land, and a personal claim for $275 also for part of the purchase money of the same premises. This mortgage has not been produced, as it was cancelled and destroyed as hereinafter stated. There is, however, no proof of its date or precise terms, and no evidence as to its rate of interest, which it may be inferred was seven per cent., but this is merely inference. It does not appear whether this

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mortgage was recorded. Bergrath assigned this mortgage to Spitzley some years before the transactions complained of, and Koster had paid on it between five hundred and six hundred dollars of principal. Whether this was paid to reduce it or as purchase money to buy it is disputed.

On the 16th day of February, 1878, Bergrath, who about that time sold his personal demand of $275 to Koster, at a discount, filed a petition in the circuit court for Clinton county in chancery, as guardian of all the minors, (including complainant, who had then been married some time), setting out the existence of the $1000 mortgage in Spitzley's hands, and his own claim of $275, and that there was no personal property of which their father died seized, and that petitioners had no property except the land. It further set out that unless land enough was sold to pay Spitzley, he might foreclose and cut off their interest. It prayed for a sale to pay off both of those claims.

The proceeding was had without notice actual or otherwise to complainant or her husband, and a sale was ordered of forty acres, a part of which was included in the mortgage, and a part was not. How this particular parcel came to be selected does not appear, but it seems to have been determined on in some way among the parties concerned.

Bergrath reported a cash sale to Koster for $1275 and the expenses of the proceeding, and this sale was confirmed.

It is to be observed that the order of the court was not based on § 5185 of the Compiled Laws, which authorizes the sale of lands to purchase or discharge incumbrances, but was made under the general statute which allows sales or other dispositions for certain specified reasons and "other peculiar reasons or circumstances." The order gave no directions concerning the use of money when raised, and the sale confirmed was a cash sale.

Upon this confirmation no cash was paid to anybody, but Koster gave a new ten per cent. mortgage to Spitzley for $450, and Spitzley handed over the old mortgage, which was burned. No release was given or recorded. Koster was treated as owner of all the remaining interest.

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This bill was filed at once on discovering what had been done, and within a little over a month from the order of confirmation, and less than a month after Koster got his deed recorded.

The court below set aside the sale and the new mortgage, and declared the title clear and discharged of all incumbrances. Bergrath, Koster and Spitzley appeal.

There is no pretence of any right in Koster as a *bona fide* purchaser, and neither he nor Spitzley claims in the answer any right as *bona fide* purchaser or incumbrancer, beyond such rights as depend on the legality of the proceedings.

We are not entirely satisfied that Bergrath, at the time of these proceedings, was acting with a wilful design of wronging the children; but that the proceedings were such as operated fraudulently, and against their rights is clear beyond doubt.

When the petition was filed Bergrath had ceased to be guardian of complainant. She was married in February, 1877, while the amendment of January 24, 1877, (Laws 1877, pp. 1, 2,) which provided that the marriage of a ward should not affect the guardianship as to property, was not given immediate effect, and therefore did not become of force until ninety days after May 22, 1877, when the legislature adjourned.

Bergrath's claim of $275 which he sold to Koster had never been allowed and was not valid against the estate of the infants. So far as the mortgage for $1000 is concerned, as already stated, we have no means of knowing its terms, nor the circumstances of Koster's payments to Spitzley. If it was a seven per cent. mortgage, the payment of $95.50 a year should have reduced it very considerably, apart from any other payments. It appears affirmatively that Koster, who was bound as a part of the rent of the land alone to pay this sum and to support the children, had personal property belonging to Trierweiler's estate which must have been of considerable value. We are very much inclined to think that the money he paid Spitzley was money for which he was accountable to the estate. It appears distinctly that

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Spitzley had no idea of foreclosing, and all the circumstances are very suspicious as indicating something like absolute and intentional fraud. But as it was a legal fraud to use complainant's name without authority, and to include a claim that was entirely invalid, and to make what was represented as a cash sale, when no cash was paid directly or indirectly beyond the new Spitzley mortgage which was a substitute to its extent, we need not look too closely into the motives of the parties.

We have some doubt whether under the general prayer of the bill it could be sustained as a bill to do more than set aside the guardian's sale and the subsequent proceedings based on it. It was not disputed that there was once a mortgage on which something might possibly be due. That part of the decree which, after setting aside all of the irregular transactions, including the new Spitzley mortgage, declared the title to be free from all liens, was, we think, not within the issues framed by the pleadings, and may perhaps be wrong in fact—although upon this we are not assured. Being outside of the case made by the bill, and the proofs not being as full as they should be on either side, we think the insertion of this clause in the decree must have been an oversight, unless it was meant to refer only to the guardian's title. The language is capable of a wider application.

Upon the merits we think the decree was right, and it should be affirmed except as to the clause declaring the land free from all liens, and as to that it should be modified. As the chief controversy has been on the other questions, and as no defence was made which indicates a willingness on the part of any of the defendants to do justice, we think that this modification should not deprive complainant of her costs in this court.

We decide nothing as to the claims of Spitzley or Koster under the $1000 mortgage, and give no opinion how much, if any, of it can be treated as valid or in force at law or in equity.

The decree must be affirmed except as above modified, with costs of this court against Bergrath, Koster and

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Spitzley, and the record remanded to the court below for any necessary further proceedings under the decree as modified

The other Justices cocuurred.

ELIZABETH PAGE v. ROBERT B. MONTGOMERY ET AL.

Bill to clear title—Possession necessary.

A bill to clear title cannot be maintained if at the time of filing it the complainant is not in actual possession of the premises, and especially if a suit at law is pending to settle the right of possession.

Appeal from Ingham. Submitted Apr. 8. Decided Apr. 13.

BILL to clear title. Dismissal of bill affirmed.

Gibson & Parkinson for complainant.

H. P. Henderson and *M. V. & R. A. Montgomery* for defendants.

MARSTON, C. J. We shall not enter upon any discussion of the merits in this case as we find objections fatal to the complainant's obtaining the relief sought, in a court of chancery.

It appears and is not disputed that the complainant was not in possession of the premises at the time of filing her bill of complaint, and that one of the defendants was in actual possession, and it also appears that a suit was actually pending in the circuit court to settle the right of possession, and that the same is still pending and undetermined. The complainant has therefore a remedy at law and should pursue it.

The decree dismissing the bill will be affirmed with costs, but so modified as to be without prejudice.

The other Justices concurred.

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JOHN M. WATTLES ET AL. v. JOSEPH MOSS ET AL.

Final judgment on certiorari—Evidence prima facie sufficient—Commissioners of deeds.

On error bringing up a judgment affirmed on *certiorari*, the Supreme Court will decide as the right of the matter may appear.

Judgment in such a case should not be reversed for error in receiving a deposition where there is proof of the fact deposed to aside from the deposition.

Plaintiffs sued as partners, and a witness on their behalf testified to admissions by defendants sufficient to make out their liability. The witness said nothing respecting the partnership of the plaintiffs, and was not cross-examined as to his knowledge of them. Defendants put in no evidence. *Held*, that a judgment for plaintiff on this evidence should not be disturbed.

It seems that non-resident commissioners of deeds, appointed by the Governor to act in other States, are not authorized to take depositions for use in civil cases; and depositions purporting to be taken by virtue of their authority are inadmissible.—By GRAVES, J.

Error to Lapeer. Submitted April 8. Decided April 13.

ASSUMPSIT. Defendants bring error. Affirmed.

Geer & Williams for plaintiff in error.

Moore & Bentley for defendants in error. The Supreme Court adjudges on *certiorari* without reference to defects which do not affect the merits: Comp. L. § 5477; *Pew v. Yoare* 12 Mich. 21; *Burnham v. Van Gilder* 34 Mich. 246.

COOLEY, J. The defendants in error sued the plaintiffs in error in justice's court and recovered judgment, which was afterwards removed to the circuit court by *certiorari* and there affirmed. It is assigned for error that the justice erred in receiving in evidence a certain deposition which had been taken in New York, the purpose of which was to prove that plaintiffs in that court composed the firm of J.

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Moss & Co., in whose favor the claim sued upon appears to have been made.

It may be that the justice erred in receiving the deposition in evidence; but if the plaintiffs were identified as owners of the claim without the aid of the deposition, the judgment ought not to be reversed for that error. We should give judgment as the right of the matter may appear: *Cheney v. Russell* 44 Mich. 620; and the right is entirely plain in this case if the plaintiffs are identified.

We think there is evidence that meets the requirements of the case. Mr. Chittenden, a witness for the plaintiffs, says he learned of a claim belonging to the plaintiffs as being in the hands of defendants, and he was sent to look after it and had conversations with the defendants about it. Their admissions were sufficient to establish their liability. Now there was no cross-examination of this witness to ascertain what his knowledge of the plaintiffs was, but the case on that branch of it was suffered to go by default, while the plaintiffs' witnesses were particular to give full evidence of the acts and admissions of defendants. Surely such a general statement is sufficient *prima facie;* and there was no attempt whatever to disprove it, the defendants refusing to put in any evidence.

The judgment should be affirmed with costs.

MARSTON, C. J. and CAMPBELL, J. concurred.

GRAVES, J. The justice admitted in evidence against the objection of plaintiffs in error the deposition of Joseph Moss; and the principal question is whether the deposition was competent.

It was taken in the city of New York, and the authority to take it is referred to the act of March 29, 1848 (Comp. L., p. 1699) as amended by Act 210 of the Laws of 1879, p. 191. The point of primary importance relates to the competency of the person who took it. He is a commissioner of deeds appointed by the governor of this State under the act of March 19, 1845, which was continued in force and amended by later statutes (Comp. L., pp. 220-222)

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and whatever capacity he possessed to conduct the proceeding and certify it depended on the effect of the regulations referred to. On recurring to the last-mentioned provisions it will be seen that they authorize the commissioner to take and certify acknowledgments and proofs of the execution of certain instruments to entitle them to registry.

They also confer power upon him to administer oaths and affirmations to any persons who are willing and desirous to make such oaths or affirmations before him, and they further provide that such affidavits or affirmations shall be as good and effectual, to all intents and purposes, as if taken by any officer authorized to administer oaths resident in this State. No other power is conferred. Nothing is said about taking depositions, and the inference is natural that the Legislature in framing this statute did not contemplate giving to these non-resident commissioners the power to examine witnesses and report the testimony. At that time the expedient of taking depositions as subsequently authorized had not been adopted. The practice in taking testimony beyond the State was by commission. The act of 1848 provided for taking depositions not only within the limits of the State but in other states also; but no notice was taken of these commissioners. They were not made use of as existing agencies qualified to serve in the taking of depositions under the act. It is very certain the Legislature did not recognize them as empowered to officiate in taking testimony. They were looked upon as provided to discharge other duties.

The first purpose of this act of 1848 was to prescribe a method for taking depositions within the State, and it required in every case that the person to act should be a judicial officer. Comp. L. § 5892. In respect to depositions out of the State the provisions were brief and general, and instead of specifying in terms the kinds of officers to conduct the proceeding it was merely declared that the depositions should be taken in the "same manner and under the same regulations, as near as may be, as are prescribed in this act * * for taking depositions of witnesses residing in this State." But it was also provided that in such cases a certificate under the official

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seal of the county clerk of the county or of the clerk of the principal court of record for the county or of some other proper county officer should be attached to the deposition, showing the official capacity in which the person acted before whom the deposition was taken. § 5906.

The amending act of 1879 sought to make the regulation more precise in regard to the persons to have authority to act in other States and it provided that depositions might "be taken *by and before any officer authorized by the laws of the place* where the same may be taken *to administer oaths.*" But no change was made in regard to the certificate of official capacity, and the showing in that respect is the same now that it always has been. And there is no exception. In every case there must be a certificate, and no one whose official capacity is incapable of being certified by the local certifying officers mentioned, is authorized to act, and if in taking a deposition he is simply an official of this State his capacity cannot be so certified, as he is not one of the class of officers designated and is not competent. But the amending act has introduced a further condition. The person empowered to act must be one who is authorized by the local laws to adminster oaths, and it is obvious enough that no official qualification derived from the laws of this State can embrace that authority.

The validity of depositions depends on the statute. There is no common-law authority for them, and they can have no validity unless they comply substantially with the provisions enacted by the Legislature. Whether a different statute or a different practice would not be better is immaterial. The method prescribed it that which is alone applicable. It seems clear that no one is authorized to take a deposition in another State under the act of 1848 who is not an officer of that State and empowered by its laws to administer oaths, and therefore that a commissioner of deeds under our statute of 1845 is not competent.

The deposition admitted by the justice was hence invalid and its admission was error, and in my judgment this is fatal. The evidence was material and it seems impossible to

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say that the result on the facts would have been the same had the deposition been excluded, and I cannot see how the judgment can be supported unless we assume to pass upon the weight of evidence.

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MERRITT E. CONKLIN ET AL. v. THOMAS BOYD.

Easement for flowage established by prescription.

An easement whereby water collecting upon land must be allowed to find an outlet, even though it overflows adjacent land, may be acquired by prescription; and evidence is admissible as to the length of time it has so overflowed without objection from the adjacent proprietor.

Error to Lenawee. Submitted October 8, 1880. Decided April 27, 1881.

TRESPASS. Defendants brings error. Reversed.

C. A. & J. A. Stacy and *Willis Merritt* for plaintiffs in error. Unlawful obstructions may be removed by any private individual injured: *Arundel v. McCulloch* 10 Mass. 70; *Williams v. Fink* 18 Wis. 265; *Clark v. Lake St. Clair Ice Co.* 24 Mich. 508; a dam not authorized by law, obstructing a public highway by water, is a nuisance *per se: In re F. S. Eldred* 46 Wis. 530; a superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels: *Kauffman v. Griesemer* 26 Penn. St. 407; *Martin v. Riddle* id. 415; *Miller v. Laubach* 47 Penn. St. 154; *Gillham v. Madison R. R. Co.* 49 Ill. 484; *Gormley v. Sanford* 52 Ill. 158, 160; *Ogburn v. Connor* 46 Cal. 346: 13 Amer. 213; *Acton v. Blundell* 12 M. & W. 324; *Butler v. Peck* 16 Ohio St. 334; *Tootle v. Clifton* 22 Ohio St. 247; *Mason v. Hill* 5 B. & Ad. 1; *Bellows v. Sackett* 15 Barb. 96; *Nevins v. Peoria* 41 Ill. 502; *Rudd v. Williams* 43 Ill. 385; *Laumier v. Francis* 23 Mo. 181; *Livingston v. McDonald* 21 Iowa 160;

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Hooper v. Wilkinson 15 La. Ann. 497; *Delahoussaye v. Judice* 13 La. Ann. 587; *Earl v. De Hart* 1 Beas. Ch. 12 N. J. 283; *Eulrich v. Richter* 41 Wis. 318; Washb. Easements 355.

Millard & Bean for defendants in error. The right to insist that water gathering on one's land shall be permitted to run into or through the lands of an adjoining proprietor does not lie either in the owner or in the public: *Bates v. Smith* 100 Mass. 181; *Pettigrew v. Evansville* 25 Wis. 223; *Dickinson v. Worcester* 7 Allen 19; *Goodale v. Tuttle* 29 N. Y. 459; *Flagg v. Worcester* 13 Gray 601; Cooley on Torts 575-7; nor can any prescriptive right so to insist be acquired by the fact that the surface water has passed over the adjacent owner's land for twenty years: *Parks v. Newburyport* 10 Gray 28; *Hoyt v. Hudson* 27 Wis. 656; an owner of land may turn back the overflow of a stream as well as surface water produced by a fall of rain or snow: *Taylor v. Fickas* 64 Ind. 167: 18 Am. L. Reg. (N. S.) 249.

Marston, C. J. Boyd brought an action to recover damages claimed to have been suffered by reason of a trespass committed upon his lands in removing an embankment, and thereby permitting surface water to flow over his lands into a pond or reservoir thereon, from off the highway and lands of an adjoining proprietor.

The tendency of the evidence on both sides is so briefly and clearly set forth in the bill of exceptions, that we give the material parts thereof in a note herewith.* We also give herewith the principal portion of the instructions given the jury by the court. (See p. 60, note †).

*And thereupon the counsel for the said plaintiff to maintain the issue on his part called as a witness Thomas Boyd, who, being duly sworn, gave testimony that he was the owner of the premises described in the declaration in this cause; that he was then in possession of said premises and had been since some time in the year 1873; that said premises front on the road on the north known as the La Plaisance Bay turnpike, a road running east and west or nearly so; that the lands lying north of the premises mentioned in said declaration are occupied by one Dewey; that the highway immediately north of the premises mentioned in said declaration as well as said Dewey's said land is low ground; that in times

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Some very nice and interesting questions are quite likely to arise concerning the flow of surface water, and we therefore fully concur with the court below in declining to attempt to lay down any rule of universal application. Confining ourselves strictly to the facts in this case, we are of opinion that the evidence introduced on the part of the defendants tended to prove that the surface water had run from off Dewey's land over that of the plaintiff and, into

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of high water Evans creek lying north of said Dewey's said land and about one-half mile north of said highway would overflow, and that in connection with the rain and melting snow would flow off south towards the land mentioned in said plaintiff's declaration and fill up a pond upon said Dewey's land immediately north of said highway; that when said Dewey's pond would become filled as aforesaid, said water would further flow across said highway and upon the land of said plaintiff mentioned in said declaration into a pond or basin of water upon the land described in the declaration in this case, some thirty-five or forty rods south of said highway, and cause said last-mentioned pond to overflow a portion of the land mentioned in said declaration; that the nature of the land between said Dewey's pond on the north side of said highway and said pond upon said plaintiff's land hereinbefore mentioned, was low swampy land with the exception of a ridge four or five rods south of said highway which was higher than either of said ponds and higher than the land immediately north of said highway upon said Dewey's premises; that there was no regular water-course between said Dewey's pond immediately north of said highway and said pond hereinbefore mentioned upon said premises described in said declaration where living water usually runs, but water was only there in times of high water, and then only surface water; that for the purpose of preventing said water from settling back from Evans creek into Dewey's pond and from Dewey's pond flowing upon the land mentioned in said declaration and overflowing the same, said plaintiff caused in the fall of 1877 an embankment to be made upon the premises mentioned in said declaration immediately south of said highway and south of the fence enclosing said land on the north of about fourteen rods long east and west and twelve or fifteen feet wide; said bank extended east and west entirely across the swail or low lands over which in times of high water the water flowed into said pond upon the land described in said declaration; that the effect of said embankment was to keep off the water flowing from the highway and Dewey's land as aforesaid, thereby rendering several acres of land tillable that otherwise would not be.

The original width of the road was six rods, as appears from the examination of the maps furnished from the department at Washington. The section line runs to the south of the present culvert in that highway. The distance from the culvert of the highway to the dam where the cut was, is fifty-nine one-hundredths of a chain, to the middle of the dam fifty-six one-hundredths of a chain, to the east end of the dam forty-nine one-hundredths of a chain. The length of dam is about fourteen rods. The height of dam above natural surface of water in the Dewey pond is 3 88-100 feet. On an average (the top of the dam not being quite uniform) the top of the dam is five or six inches higher than the top of the culvert. The dam is three feet higher than the road ditch. The highway on east side of the culvert is lower than the culvert, on the east side of the culvert at least a foot lower than the bridge over the culvert. The road at the

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the pond upon his land for far more than twenty years; that the plaintiff and his grantors had knowledge of such flowage for the entire period, and that work had been done in clearing and improving the highway, the channel, and no objections made thereto.

Now without attempting to lay down any rule as to the right of an owner of an upper field to have the water that falls thereon flow off upon the lands of another below, or of

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culvert is four and one-half rods between the fences as they now stand. The witness also stated that he was there twice in October, 1879; once he made survey and second time the level. The water in the creek was low water then. It was a dry fall. The surface of the water in the Dewey pond was then four feet and some fraction higher than in the Boyd pond.

The defendants also introduced testimony tending to show that there had been a channel there for water, though water did not always run there, from above the place called Dewey's pond, down through that pond across the road down through the Boyd place, a regular channel above spoken of, to the Boyd pond, for more than fifty years; that a road had been laid out on the section line in 1830, and the United States road, six rods wide on section line, in 1832; that the road had been worked and grubbed out one hundred feet wide, and had been used by the public ever since as a highway, but not the full width before mentioned; that the Boyd lot was taken up from the United States land-office by Luther Rawson in 1824, was purchased by Simeon Dewey with five other lots in June, 1829, who moved his family on the land and occupied it until 1831; that Simeon Dewey sold the lot in 1831, to Eliphalet Wood, who occupied the same with his family until 1855, when it was sold by Wood to Jarvis Fuller, who occupied it with his family until he sold it to the plaintiff in April, 1873, who has owned and occupied it ever since; that the water run down the natural channel across Dewey's place and across the road and down the natural channel on the Boyd lot into the Boyd pond, the greater part of the year and in wet seasons nearly all the year; that the water consisted of surface water and of water from the springs running from the hills west of the water-course or channel, and of a spring east of the water-course or channel, and sometimes also from water flowing over the banks of Evans creek at a point nearly north of Dewey's pond in a high freshet, and running down the ravine and channel to Dewey's and Boyd's ponds; that this water has run from the first settlement of the country, more than fifty years; that the turnpike had been built nearly fifty years with a culvert or passage-way through which this water has run in times of high water as aforesaid, ever since; that the channel through Boyd's farm down to this pond had never been closed up entirely until he built the dam in 1877, though he had by plowing after his purchase filled it up a part of the way; that Eliphalet Wood, during his ownership and occupancy, had employed a Mr. Pocklington to clear out an old gully from the culvert on the highway down to the Boyd pond, and this was just after he had dug and cleared out a ditch from the culvert north-west and then running north-east on the Dewey place down the natural channel; that this had been done nearly twenty-seven years before, and the ditch cleared out and made so as to give a clear passage to the water down to Boyd's pond; that no one of the owners of the Boyd farm before Mr. Boyd, ever stopped that channel to the Boyd pond; that Mr. Boyd's first act in closing the channel so far as the evidence shows

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the right of the latter, or the extent to which, in the improvement of his own lands for agricultural purposes, he can stop or prevent such flowage, we are of opinion that if the jury had found the facts to be as the defendant's testimony tended to prove, the plaintiff would not have been entitled to recover.

Whether a lower estate owes servitude to an upper or superior one in the first instance or not, we are of opinion,

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was in the fall of 1877, when he built this dam; that when in the spring of 1878, its effect was discovered in overflowing and injuring the road, Albert Hyde, the highway commissioner of Tecumseh, cut the dam through so the water could pass into its accustomed channel, and the road was relieved of the water.

†Now it is a familiar rule that no one shall be at liberty to interrupt a natural water-course so as to set the water back upon a land proprietor above him, and for the purpose of this case, I shall instruct you that the highway authorities in their control of the highway may be considered as having the right of land proprietors and entitled to the benefit of this rule. The defendants insist that this familiar rule applies to this case and that the water-way from Dewey's land to the Boyd pond, where from the evidence there seems to be a clearly-defined channel or passage-way, is to be regarded as a natural water-course. The plaintiff, on the other hand, insists that only is a natural water-course in a legal sense where living water continually flows. For the purpose of this case I shall instruct you that if you find that living water does gather on Dewey's land from living springs or other source and flow for any considerable portion of the year in an accustomed channel along by the way of the culvert in the highway and upon the plaintiff's land, then this is to be considered a natural water-course and defendants were justified in keeping it open by cutting open any embankment erected to obstruct it.

If you find, however, that there was no such flow of living water for any considerable portion of the year, you will next direct attention to the rights of the parties as regards the waters that occasionally gather in this water-way. As to these it is shown that they sometimes in very high water overflow from Evans creek. Of course if the water continuously or usually flowed from Evans creek in this water-way, a water-course would exist which could not rightfully be obstructed; but the overflow from high water appears to occur only in rare cases. In my opinion Mr. Boyd is not under obligation to furnish a way for this water. Rights in respect to this would be reciprocal; if Mr. Dewey has a right to insist that Boyd shall receive the water flowing along as it naturally would after the overflow, that Mr. Boyd would have a corresponding right to insist that Mr. Dewey should not shut it off and prevent its coming. If therefore Mr. Boyd desired to have the water for any purpose, as for example, in order to keep his pond supplied with fresh water for the raising of fish, he might claim damage of Mr. Dewey should the latter, by raising slightly the banks of Evans creek, prevent these occasional overflows. But this would be entirely unreasonable and therefore not sanctioned by the law. Dewey may prevent the occasional overflows upon him without being liable to Boyd, and Boyd may prevent the water from the overflows coming upon him without being liable to Dewey.

And now coming to the question of mere surface water, whether Dewey

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that such an easement may be acquired by prescription, and that the evidence bearing upon this subject should have been submitted to the jury. The authorities are quite fully collected and discussed in Washburn on Easements 353 *et seq.*, to which reference is made.

The judgment must be reversed with costs and a new trial ordered. A difficulty appears on the record, but as it was

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and the highway commissioners have a right to insist that this shall continue to flow in its accustomed way without obstruction from Boyd, I am not disposed to attempt to lay down any rule that shall be of universal application, but shall confine myself to the facts of this particular case. This case in my opinion does not present the broad question of the obligation of the land proprietor through whose land there is a natural waterway for surface water, to suffer it to pass upon and through his land in an accustomed channel.

The case here is of a natural basin of perhaps 175 acres, 100 acres north of the highway and 75 acres south of it, within which the surface water collects into the Boyd pond. Now there is no outlet to this pond, and the land south and between it and the river is considerably higher than in this basin; there is therefore no natural course for the flow of surface water through Boyd's place upon the land south of him and off towards any stream of water, but only a natural course for the flow of water upon his place, so that the question is not whether he shall allow a natural passage for the flow of surface water through his premises to be kept open, but whether he shall against his will receive the surface water from the lands above him into his pond as a natural place of deposit.

Now I think it is manifest from the evidence that the Boyd pond is to some extent filling up. This would be the natural consequence of its receiving the wash of 175 acres of cultivated land, and the evidence shows that the bottom of the pond is muck. The time will probably come, therefore, when this lake from natural causes will disappear, but whether this is so or not, I think Mr. Boyd, so far as it is fed by mere surface water, has a right to get rid of it if he can. It is now small or large according to the flow of water into it, but I think he has a right to get rid of it altogether by draining it or otherwise, as he may be able to do without trespassing upon others. It is no legal wrong to Mr. Dewey or to the township if in order to do so he finds it necessary to stop the flow of surface water into it from the north. He is not under obligation to keep this pond here in order that the surface water from other premises than his own may be run into it as a reservoir, but he may bring all his land including this under cultivation if he shall find it practicable to do so, and the fact that stopping the flow of the surface water into it injures the highway by setting back water upon it is not one of any legal importance in this controversy.

One further claim is made by the defendants, namely: that by reason of Wood, when he owned the Boyd place, cleaning out this water-way on his land in extension of a ditch then cut by Dewey, and evidently on an understanding between them, Dewey has acquired a right in the nature of an easement to have the way left open. I do not find in the evidence, however, any proof of an understanding from which an easement would arise or any evidence that Wood cleared out the way for anybody's benefit except his own. And the mere fact that something done by one person for his own advantage proves useful to another, can confer no legal right upon such other to its continuous enjoyment. In a new country

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not argued by counsel and will not again arise we pass no opinion thereon.

GRAVES and CAMPBELL, JJ. concurred.

COOLEY, J. did not sit, having tried the case in the circuit as special judge.

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JONAH DE MOSS v. JOHN ROBINSON, ADMINISTRATOR.

Oral promise to devise real estate.

An oral agreement to devise property to a specified person is revocable during the testator's lifetime, and is not in itself valid if it covers real estate. And where the devise is not in accordance with the agreement a payment of money in consideration of such promise is without consideration, and the money may be recovered back by the one who made the payment or by his personal representative.

Error to Van Buren. Submitted Jan. 7. Decided April 27.

ASSUMPSIT. Defendant brings error. Affirmed.

Chandler Richards for plaintiff in error.

E. R. Annable for defendant in error.

MARSTON, C. J. Harriett De Moss having received $900, offered to give it to the plaintiff in error, who was her father-in-law, "on condition that he should make his will giving his property to his two children (one of them the husband of Harriett) equally in case her husband survived her, and in case she survived her husband then that plaintiff in error should will his property equally, to the remaining son and

people often do things which for a time are for the convenience of their neighbors, and submit to things for the benefit of neighbors which as the country improves they find it for their advantage to change, and thereby withdraw the neighborly favor, and they are entirely at liberty to do this, provided they have not precluded themselves from doing so by some legal grant or contract. And I know of no evidence of such a legal grant or contract in respect to keeping open this water-way.

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herself." This proposition seemed to have been satisfactory, the money was paid over and a will afterwards made and executed, which the testator offered to read to Harriett, but she expressing confidence in the testator it was not read. Harriett De Moss dying intestate Robinson was appointed administrator and brings this action to recover back the money. The will gave certain of testator's property to his wife and also bequeathed to her his real estate for and during the term of her natural life, and subject to this life estate the real estate was bequeathed in accordance with the oral agreement with Harriett De Moss.

The administrator recovered in the court below, and we find no error in the record. The payment was made without consideration. The oral agreement related, in part at least, to real estate, and no valid agreement was made binding upon the plaintiff in error. The will he made was not in accordance with the oral agreement, and even if it had been there was nothing to prevent his revoking the same, or selling or encumbering the same during his life-time. Under such circumstances the administrator was entitled to recover, and the judgment must be affirmed with costs.

GRAVES and CAMPBELL, JJ., concurred.

COOLEY, J. This action is brought by John Robinson, administrator of the estate of Harriett I. De Moss, to recover from Jonah De Moss the sum of nine hundred dollars which it is conceded the intestate in her life-time let the defendant have of her own moneys. The defence is this: That the intestate was the daughter-in-law of the defendant, and at the time of letting him have the money was living with her husband in his family; that the sum in question was all her means, and she and her husband had contemplated making use of it in the purchase of lands, but as it could not be of much avail in that direction without leaving them considerably in debt, she decided to offer it to the defendant to pay a mortgage on his homestead, if he would agree that in the event of her surviving her husband the share the husband would

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otherwise have taken in the defendant's estate should be willed by defendant to her. The proposition was made and assented to. Unfortunately the terms are not made very clear by the evidence, and there is reason to believe they were not very definite in the minds of the parties. Defendant testified that Harriett said she wanted it so fixed that if she outlived her husband she would come in as one of two heirs—defendant having but one child besides her husband. The substance as stated by other witnesses is not very different, and on all hands it is agreed that the arrangement was to be completed by a will executed by defendant. The money was paid over and the will was made. This bore date April 24, 1876. By this the defendant gave to his wife his household goods, pictures and library for her life, and "the right to occupy" and have one-third the net proceeds of his homestead of twenty acres for her life-time; these gifts to be in lieu of dower. He then gave the remainder of his property to his two children, but provided that in case the husband of Harriett died in her life-time, Harriett should have the share that otherwise would go to him. This will was executed in due form, and defendant offered to show it to Harriett, but she expressed a confidence that it had been executed according to agreement, and did not look at it. The will remained unaltered until Harriett's death, and she and her husband continued to live with defendant.

The question is whether this will is a sufficient consideration for the money defendant received. This, it seems to me, must depend upon whether the will complies with the understanding under which it was made. There is nothing in the nature of the act to be done that precludes a party from bargaining for a benefit to be received by will; and promises to reward services in that way have been frequently considered and held valid. The cases of *Fenton v. Emblers* Burr. 1278; *Jacobson v. LeGrange* 3 Johns. 199; *Patterson v. Patterson* 13 Johns. 379; *Martin v. Wright* 13 Wend. 460; *Eaton v. Benton* 2 Hill 576; *Bayliss v. Pricture's Estate* 24 Wis. 651; *Jilson v. Gilbert* 26 Wis. 637; *Little v. Dawson* 4 Dall. 111; *Snyder v. Castor* 4 Yeates 353,

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and *Sword v. Keith* 31 Mich. 247, either affirm or recognize this principle, and in *Faxton v. Faxon* 28 Mich. 159, it is said that such a promise does not differ in its essentials from any other. Where it rests in parol its performance could not be enforced in equity if lands were to be devised; *Harder v. Harder* 2 Sandf. Ch. 17; *Gould v. Mansfield* 103 Mass. 408; unless under such circumstances as would justify the enforcement of a parol contract for the conveyance of lands; *McClure v. McClure* 1 Penn. St. 374; but if the contract is not within the statute of frauds, equity may compel those on whom the legal title has devolved to convey lands in fulfillment of the promise to give them by will: *Randall v. Willis* 5 Ves. 262; *Fortescue v. Hennah* 19 Ves. 67; *Brinker v. Brinker* 7 Penn. St. 53; *Logan v. McGinnis* 12 Penn. St. 32; *Mundorff v. Kilbourn* 4 Md. 459.

In this case the contract was not in writing, and it contemplated that lands should be devised. It was not of its own force, therefore, a valid contract. But it was fully performed on the part of the intestate, and if the will which was made by defendant was in accordance with the understanding, it was fully performed by him also. The intestate continued to reside with defendant up to the time of her death, and had defendant deceased first, she would have had the benefit of the provisions made on her behalf by the will. This performance on both sides relieves the case of any question that might otherwise arise under the statute of frauds.

Did then the will as made conform to the understanding of the parties? This is a question of fact, but it seems to me there is abundant evidence from which the jury might have found that it did. It could not have been contemplated that the rights of defendant's wife were to be disturbed or restricted: she had a contingent right of dower which defendant could not take from her, and she would also be entitled, in case she survived him, to certain articles of personal property. The circumstances of the parties are not fully explained in the evidence, but it is evident the

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property was quite limited in amount and value, and it is doubtful if she would receive anything under the will to which she was not entitled without it. This again is a question of fact. So far as the occupation and use of the land is concerned it is plain, I think, that the intention was to give her just what she would be entitled to as dower. If so, I do not see how it can be said the defendant did not perform his agreement.

The circuit judge instructed the jury that if they should find there was a complete giving of the money by decedent to her father-in-law, the defendant, retaining no rights and looking to no ultimate benefit for herself, or for another in case of her decease, then the plaintiff could not recover. If they found otherwise, they were instructed they must return a verdict for the plaintiff. This instruction made the agreement under which the money was paid wholly inoperative. In this I think there was error. I am of opinion that if the contract was substantially complied with by the will which defendant made, and which was allowed to remain unrevoked until the decedent's death, then she had received full consideration for the money she paid to the defendant, and her administrator cannot recover it back.

The judgment, therefore, I think, should be reversed.

James McGonegal v. Hannah McGonegal.

Divorce for drunkenness—Costs on affirmance in doubtful cases.

Where the appellate court is in doubt what decree ought to have been made in a divorce case, a decree dismissing the bill will not be disturbed, especially where the evidence bearing most strongly against the defendant is of occurrences which took place several years before.

Costs and other allowance *denied* in such a case, though the wife was the successful party.

Appeal from Wayne. Submitted January 13. Decided April 27.

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BILL for divorce. Complainant appeals. Affirmed.

John W. A. S. Cullen for complainant. Habitual drunkenness is defined in the following cases: *Commonwealth v. Whitney* 5 Gray 86: 11 Cush. 477; *Com. v. Boon* 2 Gray 74; *Dean v. Dean* 3 Penn. L. Journal Rep. 7; *Beatty v. Beatty* Wright O. 557; *Mahone v. Mahone* 19 Cal. 627; *McKay v. McKay* 18 B. Mon. 8; *Werner v. Kelly* 9 La. Ann. 60; *Leake v. Linton* 6 La. Ann. 262; *Threewits v. Threewits* 4 Dessau. (S. C.) 560; *Kempf v. Kempf* 34 Mo. 211; *Magahay v. Magahay* 35 Mich. 210

C. J. Reilly and *Maybury & Conely* for defendant.

COOLEY, J. The bill in this case was filed to obtain a divorce from the bonds of matrimony on the ground of the habitual drunkenness of the defendant. The circuit judge was of opinion that the case was not made out, and dismissed the bill.

The evidence in the record is not such that any court can feel entirely confident what decree ought to be made; but the circuit judge had better opportunities than we have to judge of the relative credibility of witnesses; and we are not inclined under such circumstances to reverse his decree in a case of doubt. And we are the less disposed in this case for the reason that the evidence which bears most strongly against defendant is of occurrences which took place several years ago.

The decree will therefore be affirmed, but without costs or other allowances.

The other Justices concurred.

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JAMES PRICE, AN INCOMPETENT, BY HIS GUARDIAN v. PETER PRICE, FRANKLIN ARNOLD ET AL.

Costs withheld on affirmance.

Each party may be left to pay his own costs where a decree of dismissal is affirmed in a doubtful case.

Appeal from Macomb. Submitted January 20. Decided April 27.

BILL of foreclosure. Dismissal of bill affirmed.

D. N. Lowell and *A. B. Maynard* for complainant.

Crocker & Hutchins for defendant Arnold.

GRAVES, J. The court is not satisfied that any case is made for relief in this cause and the decree below dismissing the bill is therefore affirmed, and under the circumstances each party will be left to pay his own costs.

The other Justices concurred.

OSCAR R. LOOKER v. ADA H. LOOKER.

Depositions in divorce suits must be signed.

Testimony in a divorce suit, taken out of court before a circuit court commissioner, should be read over to the witnesses for correction and authentication by their signatures; and this precaution should not be waived unless in cases of absolute necessity.

Appeal from Wayne. Submitted Apr. 6. Decided Apr. 27.

BILL for divorce. Defendant appeals. Affirmed.

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Wilkinson, Post & Wilkinson for complainant.

B. T. Prentis and *H. F. Chipman* for defendant.

MARSTON, C. J. The complainant obtained the right for an examination of the witnesses in this case in open court. No evidence was introduced on the part of defendant. Some of complainant's witnesses were sworn and examined in a room adjoining the court room but not in the presence or hearing of the judge. Defendant's solicitor assented to this testimony being so taken, while her counsel objected and neither appeared nor cross-examined these witnesses. One witness was examined before the circuit court commissioner, and the signing of the testimony so taken was orally waived by the respective parties. All the above testimony is now objected to by counsel for defendant.

Where witnesses are examined before a commissioner the testimony should be read over to them for correction and authentication by the signature of the witness. This is a safeguard against mistakes in reducing the testimony to writing that should not be waived to suit the convenience of counsel or witnesses, but only in cases of absolute necessity. In cases of conflict between witnesses, where the depositions are not signed, the court cannot be sure that the evidence would not have been corrected or been different if read over to the witness, corrected and signed, or that the conflict is not caused by the mistake of the commissioner in reducing the testimony as given. We should not however reject such evidence, but must receive it with very great caution, and where it is in conflict with other evidence properly authenticated, we must give the latter a controlling effect: *Godfrey v. White* 43 Mich. 171.

Even if we strike out the testimony not taken before the commissioner and not in the presence or hearing of the judge, which we are inclined to think should be done, there is still enough left upon which the relief prayed for should be granted.

The decree will be affirmed.

The other Justices concurred.

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NEWTON E. CRITTENDEN v. DAVID B. FISKE ET. AL.

Continuous guaranty—Notice to guarantor—Guaranty for future purchases—Acceptance.

A guaranty of payment for goods to be sold "from time to time" to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it. It would be different if the guaranty contemplated a single transaction.

Where a guaranty of payment is absolute in its terms and waives notice of times or amounts of sales or of defaults or delays in payment, the guarantor is not entitled to notice of its acceptance.

An absolute guaranty of payment for future purchases binds neither party until it has been acted on, and until then it may be withdrawn, or delivery of goods may be refused even though verbally promised.

Making sales in reliance on a guaranty of payment, amounts to an acceptance of it.

Error to Wayne. Submitted April 8. Decided April 27.

ASSUMPSIT. Defendant brings error. Affirmed.

S. E. Engle for plaintiff in error, cited as to the effect of the words "at any one time" in the guaranty: *Parker v. Wise* 6 M. & S. 239; *Douglass v. Reynolds* 7 Pet. 123; 3 Add. Cont. 132; the ultimate liability for any balance due at any time was guaranteed in *Gates v. McKee* 13 N. Y. 232; *Rindge v. Judson* 24 N. Y. 64; *Bent v. Hartshorn* 1 Met. 24; *Hatch v. Hobbs* 12 Gray 447; *Mason v. Pritchard* 12 East 227; *Mayer v. Isaac* 6 M. & W. 605; *Merle v. Wells* 2 Camp. 413; *Hargreave v. Smee* 6 Bing. 244; *Lanier v. Wyman* 5 Rob. N. Y. 147; *Rapelye v. Bailey* 5 Conn. 149; *Bastow v. Bennett* 3 Camp. 220; *Gordon v. Rae* 8 El. & Bl. 1086; but see *Hall v. Rand* 8 Conn. 567; *Aldricks v. Higgins* 16 S. & R. 212; *Keith v. Dwinnell* 38 Vt. 286; *Congdon v. Read* 7 R. I. 578; *Kirby v. Duke of Marlborough* 2 M. & S. 22; there was not a continuing

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guaranty in the following: *Rogers v. Warner* 8 Johns. 119; *Whitney v. Groot* 24 Wend. 82; *Fellows v. Prentiss* 3 Den. 512; *Cremer v. Higginson* 1 Mas. 323; *Gard v. Stevens* 12 Mich. 295; *White v. Reed* 15 Conn. 466; *Boyce v. Ewart* 1 Rice (S. C.) 126; *Glass Co. v. Moore* 119 Mass. 436; *Anderson v. Blakely* 2 W. & S. 238; *Lawton v. Maner* 10 Rich. (S. C.) 323; *Barns v. Barrow* 61 N. Y. 39; a guarantor should be notified of its acceptance: *Lee v. Dick* 10 Pet. 482; *Edmondston v. Drake* 5 Pet. 637; *Adams v. Jones* 12 Pet. 213; *Mactier's Adms. v. Frith* 6 Wend. 103; *Beekman v. Hale* 17 Johns. 134; *Stafford v. Low* 16 Johns. 67; *Allen v. Pike* 3 Cush. 239; *Mussey v. Rayner* 22 Pick. 223; *Clark v. Remington* 11 Met. 361; *McIver v. Richardson* 1 M. & S. 557.

Levi T. Griffin (*Griffin, Dickinson, Thurber & Hosmer*) for defendant in error. The guaranty in the present case was continuous: 3 Add. Cont. § 1123; Brandt on Suretyship § 130; *Melendy v. Capen* 120 Mass. 222; notice of acceptance is needless: *Farmers' &c. Bank v. Kercheval* 2 Mich. 504; *Weightman v. Bumcratz* 12 Ohio St. 273; *Union Bank v. Coster* 3 Comst. 204; *Smith v. Ledyard* 49 Ala. 279; *Carman v. Elledge* 40 Iowa 409; *Case v. Howard* 41 Iowa 479; *Mitchell v. McCleary* 42 Md. 374; *Davis Machine Co. v. Jones* 61 Mo. 409.

Cooley, J. In this case the defendants in error, plaintiffs in the court below, have recovered on a guaranty by the plaintiff in error of purchases of merchandise by one Mrs. Coe. Two questions are made in the case—*First*, whether the guaranty was a continuous one; and *second*, whether the guarantor was entitled to notice of acceptance.

The plaintiffs below were merchants doing business in Chicago. Mrs. Coe, who had dealt with them before, was not in good credit, and they declined to sell to her on time without security. She proposed Crittenden, who resided in this State, as guarantor, and they thereupon wrote and transmitted to him a paper in the following words:

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"CHICAGO, May 5, 1877.

In consideration that D. B. Fiske & Co., of Chicago, Illinois, will and do sell to Mrs. O. S. Coe, Ypsilanti, Michigan, upon credit, bills of goods from time to time as she may order, I, the undersigned, do hereby guaranty to the said D. B. Fiske & Co. prompt payment of all such bills at their maturity, the same being four months from the date of purchase or order, hereby waiving any and all notice of times or amounts of sales, or of defaults or delays in payment therefor, the amount guaranteed not to exceed the sum of ———— at any one time."

Crittenden received this paper, struck out the words "at any one time," filled the blank with two hundred dollars, signed and returned it to the plaintiffs. In reliance upon it the plaintiffs sold Mrs. Coe goods from time to time from May 10, 1877, to July 24, 1878. At this last date she was owing them $242.93. Her total purchases had exceeded $800, and had been reduced by payment and other allowances to the sum named. No notice of the acceptance of the guaranty was given by the plaintiffs to Crittenden until after the dealings with Mrs. Coe had ceased.

I. Crittenden insists that this guaranty had fully performed its office when goods to the amount of two hundred dollars had been sold to Mrs. Coe in reliance upon it, and it was not continuous thereafter. If he is right in this, he was wholly discharged when the purchases first made to the amount of two hundred dollars had been paid for. But we do not agree in this construction. He agreed to guaranty the bills purchased from "time to time" on four months' credit; and plainly contemplated that the payments as well as purchases would be continuous, leaving him still liable in a guaranteed amount not to exceed two hundred dollars. The case is not unlike *Mason v. Pritchard* 12 East 227, in which the guaranty was "for any goods he hath or may supply my brother W. P. with, to the amount of 100*l.*," and in which "all the court were of opinion with the plaintiff that this was a continuing or standing guaranty to the amount of 100*l.* which might at any time become due for goods supplied until the credit was recalled." The cases of *Hargreave*

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v. Smee 6 Bing. 244; *Douglass v. Reynolds* 7 Pet. 113; *Bent v. Hartshorn* 1 Met. 24; *Hatch v. Hobbs* 12 Gray 447; *Melendy v. Capen* 120 Mass. 222; *Gates v. McKee* 13 N. Y. 232; *Rindge v. Judson* 24 N. Y. 64, and *Grant v. Ridsdale* 2 Har. & J. 186, support the same view, and some of them in their facts bear close resemblance to the case before us. If the guaranty had evidently contemplated a single transaction, it would have been different. *Anderson v. Blakely* 2 W. & S. 237; *Boyce v. Ewart* 1 Rice (S. C.) 126; *Hotchkiss v. Barnes* 34 Conn. 27; *Congdon v. Read* 7 R. I. 576; *Strong v. Lyon* 63 N. Y. 172; *Boston etc. Co. v. Moore* 119 Mass. 435; *Reed v. Fish* 59 Me. 358.

The defendant relied very much upon the fact that the words "at any one time" were struck out by him, as showing clearly that he only meant to be liable for purchases aggregating two hundred dollars. But these words as they stood might have made the defendant liable for purchases in excess of two hundred dollars if they had been made at different times; and the inference from their being stricken out is only this: that defendant declined to accept responsibility exceeding two hundred dollars; not that he intended to limit the guaranty to the first purchases aggregating that sum.

II. We do not think defendant was entitled to notice of acceptance. The guaranty was absolute in its terms, but neither party was bound by it until it had been acted upon. The acceptance by the plaintiffs consisted in their making sales in reliance upon it; until that had been done defendant was at liberty to withdraw the guaranty, and plaintiffs were at liberty to decline to deliver goods upon it even if they had verbally promised to do so. When therefore defendant in a guaranty absolute in form waives "any and all notice of times or amounts of sales," it is evident he does not expect notice of acceptance.

The judgment must be affirmed with costs.

The other Justices concurred.

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Abraham Moody v. Harriet A. Seaman.

Complaint for forcible detainer—Complainant's interest—Widow may proceed without waiting for assignment of dower—Waiver of notice to quit—Repeals.

A complaint under the Forcible Entry and Detainer Act alleged that complainant was the landlord of the premises described, and respondent the tenant thereof; that respondent holds said premises unlawfully and against the right of said complainant, who is entitled to the possession of them in her own right and as guardian of the minor heirs of a designated person. *Held*, sufficient.

The Forcible Entry and Detainer Act does not contemplate summary proceedings to recover the possession of land unless the demandants represent the entire interest.

In Michigan a widow may bring ejectment for her undivided interest without waiting to have her dower assigned her. She has a present possessory claim capable of enforcement.

Tenants in common of the whole estate can join in summary proceedings to recover its possession.

An intestate's widow and the heirs at law represent the whole possessory estate, and where the widow has the right of possession in behalf of the heirs, and thus represents the whole title, she can bring summary proceedings to recover its possession without waiting for the assignment of her dower to her.

Proceedings under the Forcible Entry and Detainer Act may be brought against one who is in possession either as a contract purchaser, or as a lessee, and who being in default, is a tenant at will and liable to be ousted on notice.

A tenant at will can waive notice to quit.

Where a sufficient notice to quit has been given and the tenant has promised to leave at a fixed date, a repetition of the demand does not impair the effect of the original notice.

Where a statutory provision was repeated without change in what purported to be an amendatory act and the latter was afterward repealed, the original provision was repealed also.

Error to Wayne. Submitted April 12. Decided April 27.

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COMPLAINT for forcible entry and detainer. Defendant brings error. Affirmed.

J. L. Vanderwerker for plaintiff in error. A widow cannot take possession of real estate in her own right till dower has been assigned to her: 1 Washb. R. P. 251, 301, 302; *Rayner v. Lee* 20 Mich. 386; *Weaver v. Crenshaw* 6 Ala. 874; one must be entitled to immediate possession to begin proceedings for forcible entry: Taylor L. & T., § 720; *Buck v. Binninger* 3 Barb. 391; if notice to quit has been given it is nullified by a subsequent alternative notice: Taylor L. & T., §§ 485-6; *Doe v. Palmer* 16 East 53.

C. I. Walker for defendant in error. A complaint of forcible entry and detainer need not set out complainant's title (*Bryan v. Smith* 10 Mich. 229) nor representative character: *Spear v. Lomax* 42 Ala. 576; a tenant in common may make complaint without making his co-tenant a party: *Jones v. Phillips* 10 Heisk. 562; a second notice to quit does not necessarily impair the effect of the first: *Messenger v. Armstrong* 1 Term 53; *Doe v. Humphreys* 2 East 237; *Prindle v. Anderson* 19 Wend. 391.

CAMPBELL, J. Mrs. Seaman, the defendant in error, commenced summary proceedings to recover possession of land, claiming the right of possession as tenant in dower, and guardian of her infant children. She was, at the time of her marriage to Mr. Seaman, widow of John W. Pardee, who had owned the land during his life. The defendant below claimed in his own testimony to have gone into possession under a verbal agreement of sale, for a price of six hundred dollars which was to be paid by payments of seventy dollars a year, but which, as he showed, had not been paid except by some early payments about ten years ago. The testimony on the other side showed a mere tenancy at will, on rent which had become somewhat in arrears, and proof was made of a five or six months' notice to quit, a promise by Moody to give up possession on the first of April, 1880, and a second notice of fourteen days before April 1. Judgment was given on appeal for the demandant.

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The questions raised are all within a narrow compass, and need not be discussed separately throughout.

The form of the complaint* is in compliance with the statute, and within the rule of *Bryan v. Smith* 10 Mich. 229.

It is objected that Mrs. Seaman could not bring this proceeding before her dower was assigned. This might be true if she had represented no other interest, because the statute does not contemplate proceedings unless the demandants represent the entire interest. But it has not been doubted that tenants in common of the whole estate could join in such action. Under our present statutes a widow may bring ejectment for her undivided interest at once and without assignment, and is recognized as having a present possessory claim capable of enforcement. *Proctor v. Bigelow* 38 Mich. 282. In connection with the heirs at law there can be no doubt the whole possessory estate is represented. In this case it happens that she herself has the right of possession on behalf of the heirs, and there is no reason why, inasmuch as she thus represents for them and herself the whole title, she should not be allowed to vindicate the possession.

Neither is there any doubt of the right to bring this proceeding on either of the theories of the contending parties. The statute gives the right in case of breaches of land

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*COMPLAINT.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

To Harry F. Chipman, Esq., Circuit Court Commissioner, Wayne County, Michigan.

The complaint of Harriet A. Seaman of said county of Wayne, respectfully shows that Abraham Moody is in possession of the following described lands and tenements, situated in the town of Dearborn, in said county of Wayne and State of Michigan, to wit: * * * [description omitted] * * * * That Harriet A. Seaman is the landlord of said premises, and said Abraham Moody is the tenant under her.

That said Abraham Moody holds said premises unlawfully, and against the rights of the said Harriet A. Seaman, and that the said Harriet A. Seaman is entitled to the possession of the same in her own right and as guardian of the minor heirs of John W. Pardee, deceased.

Wherefore, this complainant prays that proceedings according to the statute in such case made and provided, may be taken against said Abraham Moody, and that the possession of said premises may be restored to said Harriet A. Seaman.

HATTIE A. SEAMAN.

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contracts as well as on leases. Comp. L. § 6706. The respondent himself showed he was in default, and whether he was in as purchaser or lessee, he was in either case a tenant at will, and liable to be ousted on notice. *Crane v. O'Reilley* 8 Mich. 312. It was held also in this case that such a tenant could waive notice.

In this case there was evidence of full notice, and further evidence of a promise to surrender. Unless the fourteen-day notice was a waiver of any other right the case is open to no doubt. That notice was no more nor less than a notice to leave at the time previously required and agreed on. It does not occur to us in what way a repetition of the same demand is inconsistent with the demand.

It is also claimed that section 21 [of Chapter 123] of the Revised Statutes of 1846, which prohibited proceedings in certain cases after three years' possession, is still in force. That section is obscure, and if we had occasion to consider it, might require some attention. But in 1867 it was included in a statute substituting certain sections named for the existing sections of the old law. Laws 1867, Act 94. Probably the identity of language was an error. But in 1869 (Laws 1869, p. 197) several new sections were substituted for former ones, and the law of 1867 was expressly repealed. We think there can be no doubt that the intention of this statute was to repeal all of the sections included in the statute of 1867, and therefore section 21 ceased to have any further force, and the statutes must be read without it.

No questions appear in the cause which are not covered by what has been already said.

The judgment must be affirmed with costs.

The other Justices concurred.

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JOHN W. FULLER ET AL v. RICHARD E. HASBROUCK ET AL.

Assignments for benefit of creditors—Omission of assignee to file bond—Act 198 of 1879—Attachments.

Where an assignee for the benefit of creditors has assumed the trust, his omission to file a bond within ten days for its faithful execution, as required by Act 198 of 1879, does not render the assignment absolutely void, but only voidable, and creditors may proceed by bill in equity for the enforcement of the trust.

Rights acquired by attachment are inchoate until judgment and levy of execution.

Appeal from St. Joseph. Submitted April 12–13. Decided April 27.

BILL to set aside chattel mortgages and for appointment of receiver. Complainants appeal. Reversed.

D. C. Page, *H. H. Riley* and *Chas. Upson* for complainants.

Geo. L. Yaple, *Germain H. Mason* and *H. C. Briggs* for defendants.

COOLEY, J. The question in this case is one of construction of the "Act to provide for the regulation and enforcement of assignments for the benefit of creditors," approved May 13, 1879. Public Acts 1879, p. 181.

The first section of the act provides "that all assignments commonly called common-law assignments for the benefit of creditors shall be void unless the same shall be without preferences as between such creditors, and shall be of all the property of the assignor, not exempt from execution, and unless such instrument of assignment, or a duplicate thereof, an inventory of the assigned property, a list of the creditors of the assignor, and a bond for the faithful performance of the trust by the assignee, shall be filed in the office of the clerk of the circuit court of the county where such assignor

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resides, or, if he is not a resident of this State, then of the county where the assignee resides; if neither are residents of this State, then of the county where the assigned property is principally located, within ten days after the making thereof. Such assignment shall convey to the assignee all property of the assignor not exempt from execution, and all rights, legal or equitable, of said assignor: *provided*, that no such assignment shall be effectual to convey the title to the property of the assignor to the assignee until such bond shall be executed, filed with, and approved by said clerk: *and provided further*, that no attachment or execution levied upon any assigned property of such assignor, after such assignment, and before the expiration of the time provided herein for filing such bond, shall be valid or create any lien upon such property."

The second section gives specific direction respecting the inventory, list of creditors and bond; the third declares that "every such assignment shall confer upon such assignee the right to recover all property, or right or equities in property, which might be reached or recovered by any of the creditors of such assignor;" the fourth provides for notices to creditors, and the fifth for the filing by the assignee of periodical reports. The sixth and last section is as follows:

"In case there shall be any fraud in the matter of said assignment, or in the execution of said trust, or if the assignee shall fail to comply with any of the provisions of this act, or fail or neglect to promptly and faithfully execute said trust, any person interested therein may file his bill in the circuit court in chancery of the proper county for the enforcement of said trust; and the court, in its discretion, may appoint a receiver therein, and the court shall have power to order the summary examination before himself, or a circuit court commissioner, of any party or witness, at any stage of said cause relative to the matters of said trust, and enforce attendance and the giving of testimony therein, in the same manner as in the trial of causes in such circuit courts in chancery."

The defendants Richard E. Hasbrouck and James Hill, composing the mercantile firm of Hasbrouck & Hill doing business at Mendon in St. Joseph county, on the tenth day of January, 1881, made a general assignment for the benefit of their creditors to Orlando J. Fast. The assignment purported to give no preferences. Appended to it was a list of

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unsecured creditors, and also a list of debts amounting to $5841.38, which were represented to be secured by chattel mortgages. Fast accepted the trust, took possession of and invoiced the property, and gave due notice to the creditors. He failed, however, to give the bond required by the statute. Immediately on the expiration of the ten days several of the creditors sued out attachments which they caused to be levied upon the property, and the secured creditors also took possession under their several mortgages. Thereupon the complainants in this suit, who are unsecured creditors, filed their bill in equity, setting forth all the facts, questioning the good faith of the chattel mortgages, and suggesting that they were made to give fraudulent preferences, and praying that a receiver be appointed by the court and the trust under the assignment executed by him. The assignors and the attaching and mortgage creditors were made parties defendant, and the bill prayed that they be enjoined from proceeding further in the enforcement of their respective pretended liens.

The defendants demurred to this bill, and the demurrer was sustained and the bill dismissed. This seems to have been done on the supposition that the failure of the assignee to give a bond within the ten days rendered the assignment wholly nugatory and void for all purposes; and that there was consequently no trust created, and nothing to preclude the creditors making levies.

It is very evident that this view of the statute renders the sixth section in part at least of no avail. That section expressly provides that in case the assignee shall fail to comply with any provision of the act, the court may proceed in the enforcement of the trust through a receiver. The neglect to file a bond was unquestionably such a failure; so that the case is within the very letter of the statute, and apparently within the intent also. If we look no further than the sixth section the case would seem to be clear: the contingency happened which entitled the court to intervene with its receiver, and the complainants on a showing of the facts called for its intervention.

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But the view of the defendants would also defeat the general intent of the statute, and render it worthless if not positively mischievous. The general intent of the statute is plain: it is to secure the equal distribution of the property of insolvents among all their creditors. To this end it prohibits the giving of preferences and requires security for an accounting and frequent reports from the assignee. If preferences are fraudulently attempted the intervention of equity to prevent it is authorized, and if the assignee shall fail in any particular in the discharge of his duty, equity may displace him with a receiver who shall discharge the trust impartially. If the statute fails to accomplish this intent, but on the contrary gives new opportunities for unequal distribution, the legislation has manifestly failed in its purpose.

No facts could illustrate this more clearly than those which are set forth in this bill of complaint. The moment the ten days expired which are allowed to the assignee for giving bond, several of the creditors appeared on the stage with their attachments and seized upon the assigned property. They thereby acquired, as they claim, a lien upon the property which takes precedence of all other claims. What they have done in this case may be done in every case in which an assignee shall fail to give bond, and ordinary prudence will require of every creditor, as soon as he shall learn that an assignment has been made, that he sue out his attachment, and have an officer ready to serve it the very minute the time for filing bond shall expire. Even if he shall have assurances from the assignee that a bond will be filed, he cannot rely upon it with safety, for any accidental circumstance that should prevent it would let others in ahead of him, and by collusion, while keeping a part of the creditors satisfied that he would give bond, the assignee might give the others the very preference the statute intends to preclude. This would be an extraordinary result of legislation designed to secure uniformity and equality; putting it, as it would, in the power of the assignee to defeat the trust and to distribute the property unequally in every instance.

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Other anomalous results might also be indicated if it were important.

There is undoubtedly some difficulty in harmonizing all the provisions of this statute. The statute declares the assignment "void" if the bond is not filed; but this word is frequently used in the sense of voidable, (*Beecher v. Marquette & Pacific Rolling Mills Co.* 45 Mich. 103); and it must have that construction here if it shall be necessary to give other provisions of the statute effect. The assignment as an effective trust in the hands of the assignee undoubtedly becomes inoperative and will remain so, and in a certain sense void, unless creditors take steps to save the trust and have it enforced in equity. This in our opinion is what the statute means; and this construction puts a meaning in all its terms. But it is said that the statute in forbidding attachment and execution levies upon the assigned property within the ten days, by implication recognizes the right to make such levies afterwards if bond is not given. This may be; and such levies may perhaps be perfectly valid if creditors fail to invoke the intervention of equity; it is only when the execution of the trust under the last section of the statute is called for that they are displaced.

In disposing of this case we intimate no opinion what might have been the result, if it had appeared that the assignee named in the instrument had never assumed the trust or done any act in furtherance of it. In this case there had been distinct acts of acceptance; possession taken and notice given; everything done, in fact, which could be done before the giving of the bond. Nor does any question arise here as to the effect of the suit in equity upon rights which may have become vested before it was instituted; as rights acquired by attachment are inchoate until judgment and execution levy. Nor is there any question here of the effect of laches in filing the bill; for in this case the bill was filed without any unnecessary delay.

It is a significant fact bearing upon the general intent of the statute to secure as far as possible the equal distribution of the property under all circumstances, that the third section

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enlarges very considerably the effect of the assignment, in making it pass to the assignee or to the receiver the right to question the previous conveyances of the assignor to the same extent that the creditors themselves might question them.

The decree appealed from must be reversed, with costs, and the cause remanded with directions for the entry of an order overruling the demurrer, and for further proceedings in accordance with this opinion.

The other Justices concurred.

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73 479

46 83
150 221

WASHINGTON G. WILEY v. GEORGE LOVELY.

Misdescription in deeds—Identification of premises by parol evidence—Absence of findings—Mistrial—Assessment of damages.

A conveyance is not invalidated by the fact that the plat of land referred to in the description is not recorded or that so much of the description as refers to the plat is incorrect; the land may be identified by parol evidence.

A deed described the land conveyed as lot 77 of the original plat of the village as recorded. The original plat only contained twenty-nine lots, and another plat, which was not so executed as to entitle it to record, incorrectly designated the land referred to as lot 78. Still another plat, which was not recorded, contained the lot, and it was shown that it had been held, taxed and dealt with for more than twenty-five years as lot 77. *Held* that the error in description did not invalidate the conveyance.

Judgment cannot be rendered on an alleged state of facts which has not been found, nor be given for damages if there is no finding of damage set forth in the record.

Where findings in favor of the plaintiff on all points presented could not have established his right to a judgment, the case cannot be treated as one of mistrial for refusal to find on some of them.

The Supreme Court cannot in a case at law proceed to ascertain and assess the damages involved, no matter how well established may be their measure.

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Error to Livingston. Submitted Apr. 13. Decided Apr. 27.

Assumpsit for breach of covenant. Plaintiff brings error. Affirmed.

John C. Shields and *M. V. & R. A. Montgomery* for plaintiff in error.

Waddell & Montague for defendant in error. Any description in a deed is sufficient if it identifies the premises: *Goodenow v. Curtis* 18 Mich. 305; *Twogood v. Hoyt* 42 Mich. 609; it may be aided by extrinsic evidence: 1 Greenl. Ev. §§ 286-7, n. 2; *Woods v. Sawin* 4 Gray 322; *Johnstone v. Scott* 11 Mich. 239; *Noonan v. Lee* 2 Black 499; *Atkinson's lessee v. Cummings* 9 How. 486; *Gilman v. Riopelle* 18 Mich. 164; *Anderson v. Baughman* 7 Mich. 75; *Ives v. Kimball* 1 Mich. 311; an appellate court must accept a finding as it is, and cannot amend it: *Sweetzer v. Mead* 5 Mich. 33, 109; *Scribner v. Gay* id. 513; *Peabody v. McAvoy* 23 Mich. 527.

Graves, J. Wiley, as assignee of the right of action, sued for an alleged breach of the covenant of seizin contained in a deed given by Lovely to one Charles M. Sheldon September 4, 1877.

The cause was tried without a jury and the circuit judge found for the defendant. The deed set forth the property as being "all that certain piece or parcel of land lying and being in the village of Fowlerville, county of Livingston and State of Michigan, and more particularly known and described as follows, to-wit: village lot number seventy-seven (77) of the original plat of the village of Fowlerville, as duly laid out, platted, and recorded in the office of the register of deeds for said county of Livingston."

The first plat of the village, which is of record, only designates twenty-nine lots and they are marked from one to twenty-nine. It therefore contains no lot numbered seventy-seven. Another plat is found in the record but it seems not to have been so executed as to entitle it to be recorded. This plat appears to have contained the lot under

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the designation of lot seventy-seven, but the register in transcribing it marked it by mistake as seventy-eight and hence his copy represents two adjoining lots as respectively lot seventy-eight. It therefore appears that the record of plats discloses no lot numbered seventy-seven, and on the strength of this fact the action is prosecuted.

The theory is that as the lawful record contains no lot seventy-seven the property the defendant assumed to convey never had any existence. But it is only necessary to glance at the further facts in the record to see that this view is wholly untenable. The case shows that another plat which has not been recorded does contain this lot, and that for more than twenty-five years the specific piece of ground has been held, taxed, recognized, known and dealt with as lot seventy-seven.

The grant was not impaired by the omission to record the plat, and it was competent to identify the parcel by parol evidence: *Johnstone v. Scott* 11 Mich. 232; *Noonan v. Lee* 2 Black 500. It is often necessary to resort to such evidence for the purpose of applying the deed to the subject-matter. That part of the description which speaks of the registry of the plat, and is found incorrect, may be rejected without any detriment: *Johnstone v. Scott*, supra; *Slater v. Breese* 36 Mich. 77; *Jackson v. Clark* 7 Johns. 217; *Eggleston v. Bradford* 10 Ohio 312; *Noonan v. Lee*, supra; *Butler v. Trustees First Presb. Church of Minneapolis* 27 Minn. 355; *Doe ex dem. Smith v. Galloway* 5 B. & Ad. 43; *Doe ex dem. Roberts v. Parry* 13 M. & W. 356. Enough is left to satisfy all legal requirements: *Goodenow v. Curtis* 18 Mich. 298; *Sargent v. Adams* 3 Gray 72; *Gerrish v. Towne* id. 82; *Woods v. Sawin* 4 Gray 322; *Doe ex dem. Roberts v. Parry*, supra; *Jones v. Smith* 73 N. Y. 205; *Schlief v. Hart* 29 Ohio St. 150. The description was irregular but there was no lack of subject-matter. Nothing was required which an interpretation and application according to the rules of law would not supply.

But another view is urged. It is contended that defendant's grantor derived title through an execution sale against

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one Tucker, and that this sale was void on the ground that the premises were Tucker's homestead. Whatever may be the truth concerning these facts it is sufficient that they are not found. Moreover there is no finding of damage. It is obvious that the record affords no foundation for a judgment in the plaintiff's favor. See *Shelden v. Dutcher* 35 Mich. 10; *Burdick v. Chamberlain* 38 Mich. 610, and many other cases.

May the case be dealt with as a mistrial? A further finding was asked on three points: (1) Whether a patent covering the premises had been issued by the United States, and if so at what time and to whom? (2) What title defendant claimed and assumed to hold at the time of his deed to Sheldon, and whether he had or claimed any other than was obtained by means of the execution sale against Tucker. (3) Whether during the proceedings by execution the lot was not Tucker's homestead. No further finding was claimed.

The circuit judge denied the application and refused to find on either point, and the plaintiff's counsel excepted. The record contains a bill of exceptions which purports to set forth all the evidence. But it is needless to inquire whether the showing was such as to make it the judge's duty as trier of the facts to make express findings on these questions, and it is also useless to consider whether the case was fairly susceptible of findings on these subjects and under these requests, which would have shown, with the other facts, the breach of covenant complained of. Had the judge fully complied with these requests and made findings on all the matters suggested and had such findings been in favor of the plaintiff in their utmost extent, yet there would have been no basis for a judgment in his favor. This court could not have proceeded to ascertain and assess the damage however well fixed the measure may be.

The plaintiff's brief contains a statement that "it is agreed that if the plaintiff recovers he shall recover $500 and interest from September 4, 1877." This is no groundwork for a judgment. The materials for constructing a judgment

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must appear in the record, and they must be such as to generate the legal conclusion which constitutes the result. They are not to be collected from tradition or the argument of counsel. Had the finding conformed to the plaintiff's requests the result must have been the same, because the state of facts even then would not have supported a judgment in his favor. There seems to be no room therefore for regarding the proceeding as a mistrial. Moreover the plaintiff does not ask it.

The judgment must stand affirmed with costs.

The other Justices concurred.

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79	91
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82	31
46	87
84	132
84	534
46	87
96	440
46	87
99	66

JAMES KINNEY ET AL. v. ADELIA M. HARRETT, GUARDIAN.

Guardian should not bring ejectment in his own name—Demurrer—Idem sonans.

Guardianship in socage does not exist in Michigan.

Guardians for nurture have no right of possession of their ward's lands, and cannot bring ejectment for it.

Ejectment, in Michigan, determines the title; so that no one is authorized to sue in the right of another who has the legal title. But one may recover on showing a mere right to possession, in cases where such a right is evidence as against the defendant that the plaintiff has a legal estate of some description.

A landlord may recover in ejectment against his tenant after the tenancy has expired on no other showing than the recognition of title which is always implied in a tenancy.

A guardian by appointment is not authorized, in Michigan, to bring ejectment in his own name for lands owned by the ward; but where the ward's title is fully set forth in the declaration, and the guardian is only a nominal party, the objection to the pleading should be taken by demurrer, and it is within the discretion of the court to permit an amendment.

Kenney and Kinney are *idem sonans*.

Error to Kent. Submitted April 13. Decided April 27.

EJECTMENT. Defendants bring error. Reversed.

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W. D. Fuller and *Eben Smith* for plaintiffs in error.

C. G. & W. W. Hyde for defendant in error. A declaration in ejectment filed by a guardian in his own name is sufficient if not specially demurred to: 1 Chit. Pl. 703; Gould's Pl. ch. 10, §§ 7-19; plea of the general issue admits the right in which plaintiff brings suit: *Newman v. Murphy* 1 Hill (S. C.) 153; *Edwards v. Ford* 2 Bailey 461; and also the character: *Carpenter v. Whitman* 15 Johns. 208; after verdict, it is sufficient if it were averred in general terms that plaintiff was executor or administrator of the particular estate: *Graham v. Gunn* 45 Ala. 577; *Dodson v. Scroggs* 47 Mo. 285; it is not a material misnomer to use indifferently words that are confused by common usage, though differing in sound: *Gordon v. Holiday* 1 Wash. 285; *Wilkerson v. State* 13 Mo. 91; the following words are held to be *idem sonans:* Hudson and Hutson, *Cato v. Hutson* 7 Mo. 142; Susan and Susanna, *Trimble v. State* 4 Blackf. 435; Usrey and Usury, *Gresham v. Walker* 10 Ala. 370; Herman and Harman, *Kahn v. Herman* 3 Kelly (Ga.) 266; Gravier and Gravaier, *Simon v. Hill* 2 Eng. 70; Geisler and Geusler, *Cleaveland v. State* 20 Ind. 444; Kimberling and Kamberling, *Houston v. State* 4 Greene (Ia.) 437; St. Clair and Sinclair, *Rivard v. Gardner* 39 Ill. 125; Steven and Stevens, *Stevens v. Stebbins* 3 Scam. 25; Beton and Belton, *Belton v. Fisher* 44 Ill. 32; Japheth and Japhath, *Morton v. McClure* 22 Ill. 257; McDonald and McDonell, *McDonald v. People* 47 Ill. 533.

Cooley, J. The defendant in error brought suit in ejectment as guardian of Arelia Kinney and Kittie L. Kinney, averring in her declaration that as such guardian, on October 8, 1870, she was possessed of certain described real estate, "to which said above-described real estate the said plaintiff as such guardian aforesaid claims the right of possession. And she also claims that the title to said lands is in the said Arelia Kinney and Kittie L. Kinney, her said wards, in fee-simple," and that being so possessed the plaintiffs in error entered and unlawfully withheld, etc. To this declaration

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plea in bar was interposed, but on the trial the point was made that the guardian could not maintain ejectment in her own name but must sue in the name of the wards. The point was not sustained, and the guardian recovered.

As guardianship in this State is a matter of statutory regulation, common-law rules will afford little aid in determining this question. It has been held that guardians in socage might bring ejectment in their own names; (*Wade v. Baker* Ld. Raym. 130; *Rex v. Inhab. of Oakley* 10 East 491; *Byrne v. Van Hoesen* 5 Johns. 66; *Truss. v. Old* 6 Rand. 556; *Hughes' Minors' Appeal* 53 Penn. St. 500;) but this species of guardianship is not recognized in this State. Guardians for nurture it is clear have no such right; they have not even the right of possession. *Anderson v. Darby* 1 Nott & M. 369; *May v. Calder* 2 Mass. 55; *Ross v. Cobb.* 9 Yerg. 463; *Magruder v. Peter* 4 G. & J. 323. Guardians by appointment have the authority the statute confers.

By the statute the guardian has "the care and management of the estate of the minor." Comp. L. § 4816. He is "to dispose of and manage all such estate and effects according to law." Id. § 4817. He is to "pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient, and if not, then out of his real estate, upon obtaining license for the sale thereof, and disposing of the same in the manner provided by law." Id. § 4830. He would have authority under this provision to make leases of the real estate during the minority, and to transfer the possession to the lessee. He is to "appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend." Id. § 4831. He may "dispose of the personal estate of the ward," (Id. § 4834); but except when licensed by the judge of probate to sell the real estate, or to mortgage the same, (Id. § 4625), his power over it is limited to leasing it and to the reception of the rents and profits.

If ejectment were purely a possessory action there would be reason for holding that the guardian might sue in his

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own name. But in this State ejectment determines the title. The plaintiff in his declaration "shall state whether he claims in fee, or whether he claims for his own life, or for the life of another, or for a term of years, or otherwise, specifying such lives, or the duration of such term." Comp. L. § 6213. The verdict must also "specify the estate or right which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered." It is plain that these provisions do not contemplate that one person shall sue in the right of another who has the legal title. There are many cases in which one may recover on showing a mere right to possession; but they are cases in which this right is evidence, as against the defendant, that the plaintiff has a legal estate of some description in the land: *Gamble v. Horr* 40 Mich. 561. A landlord, for example, may recover against his tenant, when the tenancy has expired, without making any other showing than that recognition of title which is always implied in tenancy; but this proves an existing estate until met by evidence that it has been terminated. *Niles v. Ransford*, 1 Mich. 338.

The suit being improperly planted, the judgment must be reversed with costs of this court. But the objection we have noticed ought to have been taken by demurrer, that the plaintiff might have gone out of court before the expense of preparation for trial had been incurred. And as the guardian is only a nominal party, and the title claimed by the wards is fully set out in the declaration, I think the court in its discretion might have permitted an amendment. The record will therefore be remanded to give opportunity for a motion now.

There was an objection to a variance in a deed between the names of *Kenney* and *Kinney;* but this is immaterial. It is, as they are commonly spoken, *idem sonans.*

The other Justices concurred.

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CHARLES BEYSCHLAG v. SANDS VAN WAGONER, WILLIAM DONNELLY, CHARLOTTE ST. BARNARD ET AL.

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98 495

Misdescription in mortgage aided by possession.

Where land has been occupied for many years under a series of grants containing an erroneous call in the description, but is fully capable of identification and actually identified, a mortgage of it as a homestead by the same description duly executed by husband and wife, is not void, but may be corrected like any other conveyance having the same description, and will not be postponed to an attachment or execution levy made upon the same title.

Appeal from St. Clair. Submitted April 13. Decided April 27.

FORECLOSURE. Defendant Donnelly appeals. Affirmed.

Moses F. Carleton and *A. R. Avery* for complainant. Where mortgaged premises can be identified in spite of a misdescription the record of the mortgage is notice to purchasers: *Cooper v. Bigly* 13 Mich. 477; *Mich. Mut. Ins. Co. v. Conant* 40 Mich. 537; *Quirk v. Thomas* 6 Mich. 89; *Cummings v. Freer* 26 Mich. 128; *Gale v. Morris* 29 N. J. Eq. 222.

S. W. Vance and *W. F. Atkinson* for defendant Donnelly.

CAMPBELL, J. The bill in this cause was filed to foreclose a mortgage on lands in St. Clair county, and to correct the description, which gave one of the lines as between sections 29 and 32, (which would have put the land in the body of the St. Clair river), instead of between sections 19 and 20. A previous statutory foreclosure was referred to, and there is no question made against the propriety of the bill to cover all of these matters if maintainable at all.

Donnelly, however, puts his main defence on the ground that the property mortgaged, being a homestead, could not pass by a defective description, and that he obtained paramount rights after the homestead ceased to be such.

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Donnelly's title rests—*First*, on subsequent deeds from heirs of the original owners; and *second*, on an attachment, levy and sale. We do not, however, see how a levy on property misdescribed, is any better than a conveyance or mortgage. Neither do we think the facts indicate that he was a *bona fide* purchaser. Unless the mortgage was absolutely void, it ought to maintained. A brief reference to the facts will be sufficient.

The mortgaged premises formed part of a larger tract once owned by George St. Bernard, who conveyed the premises in 1851 to Stephen Moore, by the imperfect description which has been followed ever since. Moore was put in possession and built upon the lot, and it has been possessed actually or with temporary intervals ever since, until it came into the hands of Sands Van Wagoner, the mortgagor. No dispute ever arose concerning its identity. It contained a reference to a smaller adjacent tract which seems to have been carved out of the same estate, and which was readily identified. The case is the usual one where there are repugnant calls in the description, some of which must be rejected, and where long possession and repeated transfers remove all doubt as to the intention of the parties.

It is not disputed that the mortgage was so executed that if the description had not been imperfect it would have bound the homestead. It is not a description of another parcel of land entirely. It is simply an erroneous description of a parcel which is easily identified by the aid of some calls in the mortgage, aided by the possession. We do not understand that the constitutional provision requiring a mortgage of a homestead to be signed by the wife of the owner, requires such a mortgage to be construed on principles different from those which govern other conveyances similarly signed. If the parties have executed a mortgage which was meant to cover their homestead, they have bound the homestead if the description is not so defective as to make it beyond the power of the courts to identify and apply it. We have no doubt, and it is not disputed, that this description can be made good for all other purposes.

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The decree below sustaining and correcting the mortgage was correct, and must be affirmed, with costs of this court against Donnelly; and the record must be remanded for further proceedings.

The other Justices concurred.

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96 360

JAMES MARTIN v. WINIFRED SHERIDAN.

Assumpsit for money left with a ward and misappropriated by the guardian—Evidence—Amendment of guardian's inventory—Compensation for a sister's board.

One who has left money for safe-keeping with another who has put it into a bank, can maintain *assumpsit*, declaring on the common counts, against one who has drawn and appropriated it on pretence of being the guardian of the person with whom it was left.

In a suit against a guardian for appropriating moneys left in the keeping of his ward, there is no error in excluding defendant's inventory of the ward's property filed in the probate court by him as guardian, or in rejecting the evidence of defendant's clerk as to what particular sums of money were included in the inventory, and as to defendant's good faith, especially if defendant does not offer to show that he has in good faith paid out the money for the ward's benefit, or done any act that would debar him from full protection on the settlement of his guardianship account in the probate court.

If a guardian in inventorying his ward's assets, in good faith includes the money of another, which he is afterwards compelled to pay over to the owner, the probate court can permit him to correct his inventory.

A man is not entitled as of course to charge his sister for board while living in his house.

Error to Calhoun. Submitted April 13. Decided April 27.

ASSUMPSIT brought by Winifred Sheridan against her brother James Martin for a certain sum of money alleged by the declaration to have been placed by her in the hands of her mother, Ellen Martin, for safe-keeping, and to be returned on request, but which said Ellen Martin deposited in the First National Bank of Marshall, whereupon James

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Martin drew it while she was sick, on pretence of being her guardian, and appropriated it to his own use. Plaintiff recovered below and defendant brings error. Affirmed.

Miner & Stace for plaintiff in error.

James H. Campbell for defendant in error. A bailor of goods can recover them from a third person though a *bona fide* vendee: Edwards on Bailments 87; Jones on Bailments 51, n. 21; owners of trust moneys can follow them into the hands of third persons: Perry on Trusts, § 828; *Grand Trunk Ry. v. Edwards* 56 Barb. 408; *Day v. Stone* 15 Abb. Pr. (N. S.) 137; *Cook v. Tullis* 18 Wal. 332; *Burtnett v. First Nat. Bank of Corunna* 38 Mich. 630.

MARSTON, C. J. We can discover no valid objection to the plaintiff's right of recovery in this case under the declaration and claim as made. In the instructions given the jury, the court most carefully protected the defendant, by limiting the plaintiff's right of recovery to a finding that her mother received the money as a special deposit, and that it afterwards came into the defendant's hands.

The claim is made that the court erred in excluding the inventory filed in the probate court by the defendant as the guardian of Ellen Martin, and the evidence of James Grace, the clerk of defendant, as to what particular sums of money were set forth or included in such inventory, and the good faith of defendant in connection therewith.

There was no error in rejecting this evidence. The inventory was made by the defendant and he could not, by including therein the moneys of plaintiff, cut off her rights thereto or transfer the same to his ward. He made no offer to show that acting in good faith he had paid out these moneys for the benefit of his ward or done any act that would prevent him from having full protection on the settlement of his guardianship account in the probate court. If he, in good faith, included the plaintiff's money in the inventory of his ward's property, and afterwards was obliged to pay over the same to the plaintiff, the probate court, upon a showing to

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that effect, would permit a correcting of his account or inventory, and thus save him from injury.

The court properly excluded all evidence tending to prove the value of plaintiff's board while she lived in the house of defendant. There was no evidence in the case tending to show a state of facts under which the defendant could charge the plaintiff, who was his sister, for board.

We discover no error in the record and the judgment must be affirmed with costs.

The other Justices concurred.

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81	270
46	95
105	167
46	95
111	686

THOMAS W. EDWARDS v. AUGUST HEUER AND HENRY BROCKSCHMIDT.

Depositions—Stenographer's notes as evidence—Act 8 of 1879.

Circuit Court Rule 51 provides that all objections to the form of a deposition shall be deemed waived if not filed and served within two days after notice that the deposition has been received. A deposition was taken under a stipulation that the notary who should take it should certify that he was not of counsel nor in any manner interested for either party. It was only certified that he did not act as counsel for either party; but notice being given under Rule 51, no objection was filed nor any motion made to strike the deposition from the files. *Held* that there was no error in refusing to exclude the deposition on the ground that the certificate did not go far enough.

Where cross-examination has been unnecessarily restricted but full investigation has been obtained before the witness is dismissed, there is no prejudicial error.

Stenographer's notes of a party's testimony in a civil case, cannot, unless by consent, be introduced to contradict him on a subsequent trial of the same case, especially if not authenticated.

Act 8 of 1879, authorizing the minutes of the official stenographer to be used in settling a bill of exceptions, does not give them the character of depositions or of record evidence generally.

Error to Houghton. Submitted Apr. 13. Decided Apr. 27.

ASSUMPSIT for the price of goods sold by Heuer & Brockschmidt to Edwards. Defendant brings error. Reversed.

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T. L. Chadbourne and *Geo. D. Lincoln* for plaintiff in error. A deposition taken on a stipulation that the notary taking it shall certify that he is not interested in the case, is inadmissible if he does not do so: *Facey v. Otis* 11 Mich. 216; *Cook v. Bell* 18 Mich. 392; *Locke v. Tuttle* 41 Mich. 407.

Chandler & Grant for defendant in error. A defect in returning a deposition is waived if it could have been amended on objection, and objection is not made: *Barnum v. Barnum* 42 Md. 293; *Morgan v. Corliss* 81 Ill. 72; *Central Railroad v. Rogers* 57 Ga. 336; *State v. Dunn* 60 Mo. 69; *Shutte v. Thompson* 15 Wal. 151; *Kansas etc. Railroad Co. v. Pointer* 9 Kan. 620.

GRAVES, J. There was no error in refusing to exclude Hughes' deposition. It was taken on stipulation which provided that the person to act in taking it should be a notary public and not of counsel nor in any manner interested for either party, and that this should be certified by the notary in his return. The only grounds of objection not distinctly waived by the stipulation were competency and relevancy. On the reception of the deposition by the clerk due notice was given according to the terms of rule fifty-one, but no objection was intimated until its offer at the trial. The defendant's counsel then contested its admission on the ground that the notary's certificate was not full enough. It stated that he did not act as counsel for either party, but went no further. There is no claim that as matter of fact he was interested, or that he acted dishonestly or partially, or that he lacked any qualification contemplated by the stipulation. Nor is there any claim that a literal adherence would have been of any practical value. The objection rests entirely on the fact that the certificate did not go to the exact extent specified.

Assuming, for the present purpose, that the defect was a sufficient departure from the stipulation to justify complaint by the defendant, yet we are quite satisfied that fair practice required that he should either make known his objection in

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the mode described in the rule referred to, or at least by reasonable notice of motion to strike the deposition from the files or suppress it. Having ample notice that the deposition had been returned in attempted compliance with the stipulation, he owed it to the plaintiffs, who were resting upon his apparent acquiescence, to use such diligence in evincing his objection as would enable them to make reasonable efforts to avert serious consequences. *Kimball v. Davis* 19 Wend 437; *Zellweger v. Caffe* 5 Duer 87; *Sheldon v. Wood* 2 Bosw. 267; *Rust v. Eckler* 41 N. Y. 488; *Sturm v. Atlantic Mutual Ins. Co.* 63 N. Y. 77; *Doane v. Glenn* 21 Wall. 33.

Several parts of the deposition were particularly objected to, but the rulings of the judge seem to have been regular. Complaint is made that the cross-examination of the witness Siller was unduly restricted. No doubt the questions excluded might have been allowed; but no harm was done. A full investigation was obtained before the witness was dismissed. Some exceptions appear where the decisions were manifestly within the judge's discretion.

But the record contains one ruling which cannot be defended. The plaintiff in error having been examined and cross-examined, the defendants in error were permitted to put in evidence, in order to contradict him and impair his credit with the jury, the stenographer's notes of his testimony on a former trial of the cause. No evidence was given to verify these notes or to invest them with the character of sworn minutes; nor was there any admission of their accuracy.

Their exclusive title to competency and credence consisted in their presence in the files as minutes made by the stenographer in the former trial when the jury disagreed. They were not depositions nor established *media* of general evidence in the cause. Neither party, except by consent or under circumstances not existing here, could use them before the jury as a method of proving the facts. To hold otherwise would imply that a party would have the right to defy objection, and rely exclusively on the minutes of a former trial, and avoid calling witnesses altogether.

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The Legislature in providing for the assistance of shorthand writers did not intend that their notes should have more force than judge's minutes, and no one has ever supposed the latter to possess the inherent character of written evidence. They are allowed to be made use of in various ways and under various circumstances, but not as depositions or evidence of record. Wharton's Ev. §§ 180 and notes, 825 and notes.

The special provision for employing stenographer's notes to settle bills of exceptions in certain cases, affords no countenance to the practice pursued below. It gives a remedy for the particular case and goes no further. In order to preserve the right to a bill of exceptions where a vacancy occurs in the office of the trial judge, the minutes of the stenographer are allowed to be resorted to; and for the specific purpose of settling the bill in such case they are declared to be *prima facie* evidence of the testimony given. Act No. 8, Pub. Acts 1879, p. 5. This declaration would have been needless, however, if these minutes were already constituted evidence by the prior law.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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ANN E. GARRISON v. WILLIAM J. STEELE ET AL.

Liquor-seller's bond—Justification of sureties—Approval by council.

A liquor dealer's bond, where the penalty has by mistake been left in blank, will be held valid at the lowest statutory penalty when the sureties have justified at that sum in accordance with the statute requiring the justification to conform to the penalty.

Such a bond in Bay City cannot be enforced until approved by the common council; and the report of a committee approving it will not be sufficient unless the report is adopted by the council.

Case made from Bay. Submitted April 13. Decided April 27.

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ASSUMPSIT. Defendants had judgment. Affirmed.

Hatch & Cooley for plaintiff. A bond may be good without inserting the name of the obligor: *Pequawkett v. Mathes* 7 N. H. 230; *Martin v. Dortch* 1 Stew. (Ala.) 479; *Williams v. Greer* 4 Hayw. (Tenn.) 387; *Campbell v. Campbell* Brayt. (Vt.) 38; *Stone v. Wilson* 4 McCord 203; *Joyner v. Cooper* 2 Bailey (S. C.) 199; *Fulton's case* 7 Cow. 484; *Bartley v. Yates* 2 Hen. & M. (Va.) 398; *Smith v. Crooker* 5 Mass. 538; *Beale v. Wilson* 4 Munf. (Va.) 380; *Vanhook v. Barnett* 4 Dev. (N. C. L.) 272; *Blakey v. Blakey* 2 Dana (Ky.) 463; *Muir v. Judge of Superior Court* 28 Mich. 266; or without showing the obligee's official capacity: *Whitsett v. Womack* 8 Ala. 466; or even if an essential word is omitted, when it is pointed out by the context: *De Soto v. Dickson* 34 Miss. 150; *Kincannon v. Carroll* 9 Yerg. 11; the court will seek to uphold it: *Probate Judge v. Ordway* 23 N. H. 198; and will supply accidental omissions in order to give effect to the intention: *Benehan v. Webb* 6 Ired. (N. C. L.) 57; *Iredell v. Barbee* 9 Ired. 250; *Giles v. Halstead* 4 Zab. 366; *Gully v. Gully* 1 Hawks. 20; *Harman v. Howe* 27 Grat. 676; *Whitney v. Darrow* 5 Oreg. 442; statutory bonds taken by officers of the court in the obligee's absence are construed liberally: *Claytor v. Anthony* 15 Grat. 518; a bond that complies substantially with the statute is valid: *Gardener v. Woodyear* 1 Ohio 170; and the obligor cannot take advantage of an omission of the conditions where it benefits himself: *Justice v. Wynn* Dudley (Ga.) 22; where the penal clause of a bond was filled out after the sureties had signed, the bond was held valid: *Bartlett v. Board of Education* 59 Ill. 364; sureties signing in blank are estopped from denying liability: *Wright v. Harris* 29 Ind. 438; where a statute required a bond for $1000 with two sureties one for $2000 with one surety was held valid: *Adee v. Adee* 16 Hun 46; *Beawfage's case* 10 Co. 99; *Austen v. Howard* 7 Taunt. 28; *Pepin v. Cooper* 2 B. & Ald. 431; *Bank v. Cresson* 12 S. & R. 306; *Bank v. Dandridge* 12 Wheat 81; *Posterne v. Hanson* 2 Saund. 51; a sheriff's bond to the

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county was held valid though required to be to the people: *Bay County v. Brock* 44 Mich. 45.

Thomas A. E. Weadock and *Holmes, Collins & Stoddard* for defendants. A bond is insufficient as a cause of action where the penalty is not stated at a fixed amount: *Spencer v. Buchanan*, Wright (O.) 583; *Ohio v. Boring* 15 Ohio 507; *Famulener v. Anderson* 15 Ohio St. 478; *Wiley v. Moor* 17 S. & R. 438: 17 Amer. Dec. 698; *Harrison v. Tiernans* 4 Rand. 177; *Howard v. Brown* 21 Me. 385; *Bragg v. Murray* 6 Munf. (Va.) 32; *Church v. Noble* 24 Ill. 293; *Case v. Pettee* 5 Gray 27; an obligee in a bond can never recover more than the penalty stated in the bond, unless, perhaps, interest and costs: *Warden v. Nielson* 1 Murphy 275: 3 Am. Dec. 691; *Carter v. Carter* 4 Day 30: 4 Am. Dec. 177; *Ansly v. Mock* 8 Ala. 444; *Commonwealth v. Forney* 3 W. & S. 353; *State v. Blakemore* 7 Heisk. 638; *Hovey v. Rubber Tip Pencil Co.* 38 N. Y. Superior Court 428; *Van Wyck v. Montrose* 12 Johns. 350.

Campbell, J. Plaintiff sued defendants on a liquor dealer's bond for a judgment she had obtained against Steele for damages on account of the sale of liquor to her husband. The bond, which was made to cover dealings in Bay City, was dated May 1, 1878, and declared on as approved June 3, 1878. It contained no sum written out as a penalty, and was set out in its precise words, with an averment of a penalty of one thousand dollars.

The defence rested on the double ground of want of penalty, and want of approval.

The statute (Laws 1877, p. 214) requires the bond to be for not less than $1000 nor more than $3000, and requires the sureties to justify "in a sum equal to the amount of the bond." In the present case they justified in the sum of one thousand dollars. We think the omission of the penalty is supplied by the justification—especially as that covers only the lowest sum for which any bond could be given. This defect may be disregarded.

The statute is very express that no bond shall be received

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without written endorsement of the approval of the common council. This bond had on it a brief approval signed by the recorder, which we have no doubt could be connected with any legal action of the council authorizing it.

But the proceedings of the council are not shown to have amounted to such an approval. The records show that the "retrenchment committee" were required by resolution in connection "with the city attorney" should "report on all liquor bonds for the ensuing year."

The council proceedings show that on the 3d of June the retrenchment committee, without any mention of the city attorney, reported the acceptance of eight bonds. Two others are mentioned, and it is not very clear whether the entry means that two others were referred by the committee or were referred by the council, to the city attorney.

There is no mention of any approval or other action on the eight bonds by the council. A further report by the same committee, on an entirely different subject, is followed by the word "adopted." This cannot properly be made to cover two different reports as it stands. The council could not delegate to any committee the final approval of bonds, and while we are not inclined to doubt the validity of a single entry of approval of several bonds at once, we think under the statutes there must be some distinct evidence that the council acted. If, as is most probable, the reference of two bonds to the city attorney is to be regarded as made by the council itself, that shows distinctly there was no direct approval of the rest. If made by the committee it would probably indicate that until those were examined action on the rest would be suspended. In either case it is fairly to be inferred that action was postponed, or else that it was erroneously supposed that the council had legally delegated all its powers to the committee.

We think the court below was correct in holding that no approval was shown.

The judgment should be affirmed with costs.

MARSTON, C. J. and GRAVES, J. concurred. COOLEY, J. did not sit in this case.

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CHARLES WINCHESTER v. ROBERT B. KING.

Trial—Theory of case—Mortgage by contract purchaser.

The plaintiff has a right to have the case submitted to the jury upon the theory on which he presents it.

Mortgaging goods held under a contract of purchase, before fulfilling the obligations of the contract, is an assumption of ownership, and the intent with which it is done is immaterial so far as concerns the vendor's right to reclaim them.

Error to Iosco. Submitted April 13. Decided April 27.

REPLEVIN for goods which plaintiff claims to have placed in defendant's hands under a contract, and which defendant mortgaged to one Forrest. Plaintiff brings error. Reversed.

R. Z. Roberts for plaintiff in error.

William H. Simpson and *Hatch & Cooley* for defendants in error.

MARSTON, C. J. We are of opinion that the court erred in the instructions given relating to the chattel mortgage placed upon the goods by King. The plaintiff had a right to have the case submitted to the jury upon the theory that the goods mortgaged had been furnished by him under the written contract of March 26th, and in this view of the case the court was requested to charge the jury that giving a chattel mortgage thereon to Forrest would be such a "termination of the bailment as to entitle the plaintiff to the possession of the goods." This was refused, but the court did charge that placing a chattel mortgage thereon with intent to deprive the plaintiff of the proceeds of the goods, if done fraudulently, would justify the plaintiff in rescinding the agreement.

The intention with which the act was done would be immaterial. It was an assumption of ownership by King,

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and wholly inconsistent with the title claimed by Winchester under the contract. The effect as to Winchester's rights was the same, whatever the intent of King may have been.

For this error the judgment must be reversed with costs and a new trial ordered

The other Justices concurred.

CLARK A. PRESTON & LAUREN MERRIAM v. WM. D. YOUNG.

Novation—Promise to pay another's debt.

A firm of lumber dealers made a contract with a firm of manufacturers whereby the latter were to convert the timber on certain premises into shingles and siding. The manufacturers made an independent contract with a logger to cut the timber and haul it to the mill, but as they were slow in making payment, the logger went to the dealers for payment and they verbally agreed to pay him on orders from the manufacturers. Several payments were made in this way, but when the logger tried to obtain a final settlement they refused to pay him the balance, and he brought suit on the agreement. *Held* that it could not be maintained. There was no novation except so far as the orders were actually given; and the verbal agreement was a promise to pay another's debt, and, under the statute of frauds, could not be enforced.

Error to Montcalm. Submitted Apr. 14. Decided Apr. 27.

ASSUMPSIT. Defendant brings error. Reversed.

Smith & Sessions for plaintiff in error. A promise to pay another's debt is void: *Bresler v. Pendell* 12 Mich. 224; *Welch v. Marvin* 36 Mich. 61; *Hill v. Raymond* 3 Allen 540; *Baker v. Ingersoll* 39 Mich. 158; *Gower v. Stuart* 40 Mich. 747; 1 Throop Verb. Agreements 195, 209.

Ellsworth & Sapp for defendant in error. A promise to pay the debt of another is not void where its purpose is also to benefit the maker: *McCreary v. Van Hook* 35 Tex. 631;

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Tisdale v. Morgan 7 Hun 583; *Dyer v. Gibson* 16 Wis. 557; *Barker v. Bradley* 42 N. Y. 316: 1 Amer. 521.

GRAVES, J. July 6, 1878, Preston & Merriam entered into a written contract with John A. Taft and Amasa Wilder by which the latter agreed to place a shingle and siding mill on certain premises specified, and convert the pine timber thereon into shingles and short siding, for which said Taft & Wilder were to have three-fourths of said shingles and two-thirds of the siding. It was also agreed that Preston & Merriam should have the right of selling Taft & Wilder's share of the shingles at market price in lots not to exceed two and one-half millions at a time, except one-tenth to be deliverable to Hayes & Webber as fast as cut, and that five cents per thousand should be allowed and paid for this service.

The contract further provided that whenever Taft & Wilder should deliver at the railroad two hundred and fifty thousand shingles, Preston & Merriam should advance to them two dollars per thousand on stars and one dollar per thousand on No. 1.

The arrangement was to continue for two years from October 10, 1878, unless in consequence of some default on the part of Taft & Wilder, Preston & Merriam should elect to terminate it sooner. It is needless to refer to the other stipulations.

Taft & Wilder erected the mill and then bargained with Young to take the timber standing, cut and haul it to the mill and place it on the roll-way for thirty-five cents per thousand. Young consequently became a sub-contractor under Taft & Wilder for part of the service they had agreed to render. The transactions were not dependent but in contemplation of law entirely distinct. The duties and obligations pertaining to each were exclusive of the duties and obligations of the others. The parties to one could hold each other to payment and performance without regard to the other, and neither contract could be impaired except by its own parties. All this may be supposed to have been well understood by the plaintiff and defendants.

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Young went on under his contract with Taft & Wilder until into February, at which time he had about 3800 logs in the mill yard. He had run up a debt to Merriam for feed and Taft & Wilder were owing him a larger sum. He complained of being unable to obtain payment, and proceeded to call on Preston & Merriam in order to effect some arrangement, and this action depends on the transaction which then occurred. The interview was at Edmore. Taft & Wilder were neither present nor concurred in it. Preston & Merriam were both present and Preston's son was also by. They agree as to what the arrangement was but contradict Young. There was no writing. As the case is presented it is necessary to confine attention to Young's version.

He testifies that he told Preston & Merriam he could stock the mill no longer unless they paid him; that he could not work without money; that he claimed the logs as his until paid his thirty-five cents per thousand, and that, if they did not pay him, he would take the logs to another mill, "to get something out of them;" that he asked if they could not pay him something on the amount already due him from Taft & Wilder; that Merriam then agreed to credit him on his individual account for the accrued indebtedness, and Preston agreed that, if he would go on and stock the mill for them, they would pay him the money on each lot of 371,000 shingles, provided he brought orders from Taft & Wilder; that with this understanding he went on and thereafter obtained orders from Taft & Wilder on Preston & Merriam and the latter continued to cash them until July; that he then went to see them to make a final settlement, and "they claimed another bargain" and refused to pay the residue of his demand. He also testifies that he had nothing to do with Taft & Wilder; that he did not work for them and was not to look to them for his pay.

This is nothing more than an explanation of what his purpose was and an expression of his own idea of the nature and effect of the transaction. It cannot control the legal operation of the undoubted facts. The orders were all drawn with direct reference to the liability of Preston &

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Merriam to Taft & Wilder under their written contract, and they all plainly and positively recognized that that contract continued pending and operative in favor of Taft & Wilder against Preston & Merriam, and their purport plainly negatived the idea of their being instruments to carry out a new original agreement between Young and plaintiffs in error for stocking the mill. No ordering by Taft & Wilder of the kind thus made use of and acted on by Young and plaintiffs in error would have been necessary or appropriate in respect to a distinct original agreement to which Taft & Wilder were not parties. These orders are of great force as evidence of the actual construction which the parties themselves put on the transaction. It was only through them that Young obtained the money from plaintiffs in error under the arrangement at Edmore, and it was on them alone as requests of Taft & Wilder to pay, and as vouchers against Taft & Wilder, that the plaintiffs in error made payment. Preston & Merriam were not discharged from their liability to Taft & Wilder, and the extent of their undertaking to Young was to pay him whenever by so doing the payment would apply on their liability to Taft & Wilder. They did not mean to be liable twice over for the same thing: once to Taft & Wilder and again to Young, and they took pains to avoid it. Their agreement with Young was not an original one; but merely an undertaking to pay on the debt or obligation of Taft & Wilder as the latter should order: and hence it contemplated a novation in just so far as it should be actually carried out. In short the essential feature of the arrangement was that Taft & Wilder were to be Young's debtors, and hence in a situation in which it would be practicable and appropriate for them to order the plaintiffs in error as their debtors to make payment to him.

Taking Young's testimony in connection with the orders which are not questioned, and it makes a case which admits of only one construction. The promise relied on is within the statute of frauds, and not enforceable for want of writing. Comp. L. § 4698, subd. 2. It was an undertaking to pay for Taft & Wilder. The version given by the defendants of

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the transaction at Edmore most manifestly entitled them to a verdict if believed. The court however refused a request to that effect, and submitted the case under instructions which authorized the verdict in Young's favor.

The judgment should be reversed with costs and a new trial granted.

The other Justices concurred.

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EDGAR READING v. SOLYMAN WATERMAN.

Ejectment against mortgagee in possession—Defect in notice of foreclosure and in sheriff's deed—Statutory foreclosures—Idem sonans.

Notice of a statutory foreclosure must in all things required by statute conform to the statutory provisions. But where it contains all that the law requires it will not be void for errors in other respects which are not misleading. *Lee v. Clary*, 38 Mich. 223, affirmed.

A notice which identifies a mortgage by date and parties and accurately describes the time and place of its record, is not rendered invalid by calling a name *Dixon* which should be *Dickson*, nor by having the date of the mortgage given once correctly and once incorrectly, inasmuch as it furnishes the means of its own correction. Neither is a notice, if published for the proper time and giving the proper time and place of sale, invalidated by an error of date.

A mortgagee cannot take or hold possession before foreclosure without the consent of the mortgagor or his assigns. But where he is deliberately and intentionally put in possession by the mortgagor, his possession is rightful and ejectment cannot be brought against him without some action previously taken which will terminate his right and render his continuance in occupancy wrongful.

A sheriff's deed on foreclosure is not made invalid by an error in setting forth the date of a mortgage, which is so described otherwise as to be clearly identified. The statute does not prescribe the form of such a deed.

The statute itself fixes the time of redemption on foreclosure, and a certificate which fixes an impossible time will not destroy the validity of the foreclosure.

Error to Berrien. Submitted April 14. Decided April 27.

EJECTMENT. Defendant brings error. Reversed.

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Champlin & More for plaintiff in error. A notice of foreclosure sale is not vitiated by spelling the mortgager's name *Dickson* instead of Dixon, as the names have the same sound: *Webb v. Lawrence* 1 Cr. & M. 806; *Williams v. Ogle* 2 Stra. 889; *Ahitbol v. Beniditto* 2 Taunt. 401; *Rex v. Foster* Russ. & Ry. 412; *Armstrong v. Colby* 47 Vt. 359; *Schooler v. Asherst* 1 Litt. (Ky.) 217; *Taylor v. Rogers* Minor (Ala.) 197; *Cantley v. Hopkins* 5 Stew. & P. 58; *Robertson v. Banks* 1 Sm. & M. 666; *King v. Clark* 7 Mo. 269; *Wood v. Hancock* 4 Humph. 465; *Buhl v. Trowbridge* 42 Mich. 44.

Edward Bacon for defendant in error.

CAMPBELL, J. Waterman, in August, 1868, began an action of ejectment against Reading, who was in possession as purchaser under *mesne* conveyances from Anna H. Dickson, of lot 27 in William Justice's plat of Niles, to recover that lot, on which Reading had begun and nearly completed very expensive improvements. It appears from the record that Waterman, in May, 1849, bought this land of Anna H. Dickson, and gave back a purchase-money mortgage. On the 18th of December, 1852, she began to publish notice of a statutory foreclosure, the sale being fixed for March 15, 1853, on which day she bid off the premises, and the deed was in a few days put on file with the register of deeds. The land was never redeemed, and Waterman remained in possession until May 15, 1855, when he surrendered possession to Mrs. Dickson, who subsequently sold to the party through whom Reading derived his title.

The ejectment suit was allowed to sleep until 1878, when it was brought to trial, and Waterman prevailed in the Berrien circuit on the ground that the foreclosure was irregular. He proved no notice to quit, and prevailed on the supposed defect of the foreclosure. He never redeemed, and never offered to redeem.

While it is the settled law of this State that a mortgagee has no right to take possession until foreclosure absolute, as

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decided in *Newton v. McKay* 30 Mich 380, and *Lee v. Clary* 38 Mich. 223, as well as some other cases which have been before us, yet it was intimated in *Newton v. McKay*, that where a mortgagor voluntarily puts a mortgagee in possession, he may thereby preclude himself from relying on grounds otherwise open to him. We think it would be entirely wrong to allow a mortgagor, who has deliberately and intentionally yielded up possession to a claimant whose rights, if any, are derived from his own contract, to treat the possession as tortious and bring ejectment without either notice or payment. We have no doubt that Mrs. Dickson and her grantees were lawfully in possession, whether the foreclosure was regular or not, and that they could not be ousted by ejectment.

But inasmuch as the controversy hereafter may present some new features, we are obliged to consider the questions raised under the foreclosure itself. These questions arise touching the notice of sale, and the sheriff's deed.

The sheriff's deed is said to be defective in two respects. It gives a wrong date to the mortgago, and the certificate indorsed upon it declares the deed if not redeemed will become effectual on the 15th day of March, 1844, when it should have been 1854.

The sheriff's deed described the mortgage correctly in all but its date, which was put as May 8, 1848, when it should have been 1849. The names of the parties, and the date and volume and page of record, were properly set forth, as well as the day and place of sale, and the amount of purchase money. The statute contains no direction concerning the form of the sheriff's deed beyond the requirement that it shall correctly show the price of the parcels sold. In all other respects it leaves the instrument to be determined by the rules of the common law. There can be no difficulty from this deed in tracing it back to the mortgage as recorded, and any incorrect matter would be at once made manifest and corrected by that reference. *Slater v. Breese* 36 Mich. 77; *Shepard v. Shepard* id. 175. In the absence of any statute to the contrary we think the rules applicable to other

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deeds are applicable to this; and that the deed contains enough to remove any difficulty.

The error in the endorsement cures itself by reference to the deed itself, from which the time of redemption could be determined at once: *Johnstone v. Scott* 11 Mich. 232. Such a mistake was there held unimportant.

The blunders which appear to have got into the notice of sale indicate very careless printing, and the changes in the different issues are not easily explained. But how far they can be allowed to defeat the sale depends on the effect they were likely to have on persons interested.

Authorities are cited and arguments made on this matter, which relate to proceedings which are had of a hostile character and *ex parte*, where it is commonly held that such action contrary to the usual course of law, and against persons who have not the common-law benefits of self-protection, should be held invalid, unless conforming strictly to statutory authority.

We held in *Lee v. Clary* 38 Mich. 223, that statutory foreclosures did not come in all respects within the same mischief. The statutes regulating them are made to enlarge and not to cut down the rights of mortgagors. Before such statutes were passed, sales made under a power of sale contained in a mortgage were governed by the same rules applicable to sales under any other power, and courts in the absence of statutes have never applied to such powers any such technical rules as would impair the security of purchasers. The power is part of the contract, and should be construed on principles applicable to contracts, and not as a hostile process.

The statutes were intended to prevent surprise or unfairness, and they should be enforced in everything substantial. Courts cannot disregard any of their positive provisions. But on the other hand those provisions cannot be enlarged or unreasonably construed so as to render mortgage sales unsafe, or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be

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disregarded, substantial regularity is all that should be held imperative.

The only things absolutely required in the notice of sale are—the names of the parties original or by assignment, the date of the mortgage and of its record, the amount claimed to be due, and a description *substantially* agreeing with that in the mortgage.

In the present case the body of the notice contained the name of the mortgagor, but the mortgagee was named therein "Dixon" and not "Dickson." These names, however, are the same in sound, and legally identical unless shown to refer to two different persons. Here the name of Mrs. Dixon was referred to as mortgagee and the mortgage itself removed any such possibility of error. The name signed to the notice was shifted by some accident to the types, but as the notice showed the foreclosure was on behalf of the original mortgagee, no harm could come from such a manifest slip, which could mislead no one.

The notice was first published December 18th, but was dated December 28th. This was also of no account as the error was palpable. The day of sale was properly given, and the publication full.

The notice gave the date of the mortgage once correctly, and once incorrectly. The date and place of record, and the volume and page were also given accurately. It was manifest on the face of the notice that one of these dates was wrong, and the means of correction were given by the record. It is indeed suggested that the date given correctly as 1849 refers to the bond and not to the mortgage which is mentioned as of 1848, the days of the month corresponding. This does not strike us forcibly, for it would not be likely that a mortgage given one year would refer to a bond not made until a year after. It is not to be supposed that purchasers under foreclosure sales look at the dates of instruments without consulting the records to ascertain the state of the title. The information given by this notice directed every one immediately to the record, and that necessarily explained the true date of the

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two dates set out in the notice itself. We cannot imagine that any one could be deceived by the imperfection.

We are, therefore, of opinion that none of the mistakes were substantial, or operated in any way to the prejudice of Waterman. Judgment should have been given in favor of Reading. As the case was tried by jury we can render no final judgment on the merits, and can only reverse the judgment below with costs of this court and remand the case for a new trial at the circuit.

The other Justices concurred.

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JOHN LAMB v. DAVID E. HINMAN ET AL.

Chancery records—Specific performance.

The original minutes of oral testimony taken in open court in a chancery case, must not be removed from the files to be used as copy in printing the record, unless by an order of the Supreme Court. But in a case where they were so removed and were destroyed by the printer, the appellants who were not shown to have had any knowledge that they had been so used, were allowed, for the purpose of saving their rights, to file a copy of the evidence in lieu of the original.

A son agreed with his father to remove with his family to the latter's house, take care of the father and turn over to him annually a certain proportion of the crops, in consideration of all which the father was to deed to the son a certain parcel of land, which he promised to do, but did not. The only uncertainty related to the time at which the deed was to be given. *Held*, that the case was sufficient to sustain a bill for specific performance against the administrator and heirs at law of the father.

The reason why taking possession of land under an oral contract is such part performance of the contract as will sustain a bill for its specific performance, when payment of the purchase price is not, is that in the former case there is no certain basis for estimating damages for the breach.

Motion for leave to file a substituted return. Submitted October 5, 1880. Granted October 6, 1880.

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D. E. Hinman and *Henry F. Severens* for.

Edward Bacon against.

MARSTON, C. J. An appeal having been taken to this court from the decree rendered in this cause, counsel for appellant, without any order from this court or special reason existing therefor, before return made, placed the original minutes of the oral testimony, which had been taken in open court, in the hands of a printer, to have the record printed, on his promise to save and return it; but, when printed, the original manuscript was then destroyed by the printer. Upon such a showing a motion is made for leave to file a copy of the evidence in lieu or as a substitute for the original destroyed. The motion is very reluctantly granted, and only to save the rights of the appellants, who do not seem to have had any knowledge of such use being made of the testimony. Such a use is wholly irregular and should not be permitted, and the granting of the motion in this case must not be taken as an approval of the course adopted, or relied upon as a precedent in cases hereafter arising.

The other Justices concurred.

Appeal from Berrien. Submitted April 14. Decided April 27.

SPECIFIC PERFORMANCE. Defendants appeal. Affirmed.

Edward Bacon for complainant. Taking possession of land and working it is such part performance of a verbal contract of sale as to entitle the person doing it to specific performance: *Faxton v. Faxon* 28 Mich. 160; *Twiss v. George* 33 Mich. 254; *Weed v. Terry* 2 Doug. (Mich.) 351; *Switzer v. Gardner* 41 Mich. 164; *Cilley v. Burkholder* id. 751; *Scott v. Bush* 26 Mich. 421; *Rhodes v. Rhodes* 3 Sandf. Ch. 281; *Lobdell v. Lobdell* 36 N. Y. 330; *Gillett v. Bowman* 43 Mich. 477; Story's Eq. Jur. § 761.

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Henry F. Severens for defendant in error. The contract was not sufficiently definite to warrant specific performance: Browne St. Frauds, §§ 452, 492-3; *Gosse v. Jones* 73 Ill. 508; *Taylor v. Staples* 8 R. I. 170; *Williams v. Morris* 95 U. S. 444; *Wright v. Wright* 31 Mich. 380; *Jones v. Tyler* 6 Mich. 364; *Case v. Peters* 20 Mich. 298.

Cooley, J. Specific performance is prayed in this case of an oral contract alleged to have been made by complainant with Hugh Lamb, his father, now deceased. The defendants are the administrator and heirs at law of Hugh Lamb.

The case made by the bill is that on or about October 12, 1872, Hugh Lamb owned a certain eighty-acre lot of land in the township of Weesaw, of the value of about $2400, upon which he lived alone; that he was then seventy-two years of age, and very infirm; that among his infirmities was an ungovernable temper which rendered it difficult for others to live with him; that he had been letting his land on shares and had not succeeded well in so doing; that he had no team, little live stock and few farming utensils; that complainant was then a married man, living with his wife and two children about a mile from his father; that his father went to see him, and after talking over his affairs and circumstances, entered into a verbal agreement with him in substance and effect, as follows: On the part of complainant it was agreed that as soon as suitable preparations could be made, complainant with his wife and family should remove to his father's dwelling-house on the land aforesaid, and live with him during the remainder of his life, and should give him suitable care and attention, and should farm the land, rendering to his father annually two-fifths of all the wheat and one-half of all the corn raised on the land, all to be delivered on the land, the wheat in the half bushel and the corn in the shock or row; that complainant should furnish the seed, farming utensils and team for use on the farm, and supply his father with suitable board, lodging, washing and mending, and on the part of said Hugh Lamb it was agreed

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that he should pay annually to complainant seventy-five dollars, and let complainant have the south 40 acres of the land, and give him a good and sufficient deed thereof; that this agreement was fully performed on his part to the satisfaction of his father; that complainant took possession of the south forty as his own in July, 1873, and has since cultivated and improved the same; that his father often promised to give complainant a deed of said south forty, but neglected to do so, and died without having given a deed, in September, 1878, and that since his death the heirs at law and the administrator appointed to settle his estate refuse to recognize and perform the agreement; wherefore complainant prays the aid of the court.

The defendants answered, denying that Hugh Lamb ever made such an agreement, and the case was brought to a hearing on pleadings and proofs. We are convinced by the proofs that a contract substantially as set up in the bill was made by the parties, and that complainant has strong equities in his favor which should be recognized if no inflexible rules of law forbid. The evidence that proves the contract discloses little discrepancies in the understanding of particulars, but not such as to make us doubt the parties having agreed upon the terms of an arrangement as complainant now describes them.

If there is any doubt as to the precise terms of the contract, it concerns the time when the deed was to be given. The complainant seems to have expected his father would give him a deed without any great delay; but the agreement fixed no time; and as the retention of the title constituted the father's security for the performance by complainant, it was not unnatural that he should delay putting the security out of his hands. If the contract had been in writing, Hugh Lamb would have had the legal right to decline to part with the title so long as he lived; and it is no reason for declining specific performance of the oral contract that complainant had expected his father would so far confide in him as to make the deed in person instead of leaving it to be made

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by his heirs. We think, therefore, that so far as proof of the contract is concerned, the case is sufficiently made out to answer the requirements of cases relied upon by defendants. *Case v. Peters* 20 Mich. 298; *Wright v. Wright* 31 Mich. 380.

But it is said there has been no such part performance as can take the case out of the statute of frauds. The most important act of part performance was the taking possession of the land, occupying and cultivating it during the father's life. But this it is said was not in fact the complainant's possession, but the possession of the father; so that on this branch of the case there is substantial failure to make out any recognizable equity.

The reason why taking possession under an oral contract is recognized as a ground for specific performance when payment of the purchase price is not, is that in one case there is no standard for the estimate of damages when the contract is repudiated, and in the other there is a standard that is definite and certain. A purchaser who takes possession of land under an oral purchase is likely in so doing to change very considerably—perhaps wholly—the general course of his life as previously planned by him; and if he is evicted on a repudiation of the contract, any estimate of his loss by others must, in many cases, be mere guess-work. The rule, therefore, rests upon the element of uncertainty, and not upon any technical ground of exclusiveness in the possession. And upon this point no case on its equities could be plainer than this. Complainant abandoned one home and made a new one in reliance upon the oral contract; occupied the land bargained for and cultivated it for six years in confidence that the contract would be performed; and it is not too much to say that the whole course of his subsequent life was probably changed in consequence. To deny relief under such circumstances for no other reason than that he did not occupy exclusively, would be to make the whole case turn upon a point in itself unimportant as affecting the real equities. The case is within *Kinyon v. Young* 44 Mich. 339.

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The decree of the court of chancery was in favor of complainant, and it must be affirmed with costs.

The other Justices concurred.

WILLIAM FARNSWORTH v. WALTER H. COOTS.

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Suretyship—Alteration of obligation—Special questions.

A surety only engages to make good a deficiency; and an arrangement between his principal and the creditor, without his privity, whereby the principal is not to be sued by the creditor, is a substantial alteration of the contract of suretyship to the surety's prejudice.

In an action brought by the obligee in an indemnity bond against the surety, there was evidence tending to show that the principal and the obligee had agreed, without the surety's knowledge, that the principal should not be sued on the bond, but that suit should be brought, in the interest of the principal, against the surety. The defendant offered for submission to the jury special questions as to whether the suit was not brought for the benefit of the principal, and not for that of the obligee, and whether a check given by the principal to the obligee's attorney, but not used, had not been given on the understanding that the principal should not be sued on the bond. The court refused to submit the questions and did not cover them in his charge. *Held*, that the refusal was erroneous.

Error to Wayne. Submitted Apr. 14. Decided Apr. 27.

DEBT on bond. Defendant brings error. Reversed.

Stewart & Galloway for plaintiff in error. A surety can rest on the terms of his contract, and any change in them, without his consent, even though it be for his benefit, discharges him: *Bethune v. Dozier* 10 Ga. 235; *Taylor v. Johnson* 17 Ga. 521; *Miller v. Stewart* 9 Wheat. 680: 4 Wash. 26; *United States v. Tillotson* 1 Paine 305; *United States v. Hillegas* 3 Wash. 70; *St. Alban's Bank v. Dillon* 30 Vt. 122; *Locke v. McVean* 33 Mich. 473; *Todd v. Greenwood School District* 40 Mich. 294; so do any dealings between the principal debtor and the creditor which might enlarge the surety's liability: *Mayhew v. Boyd* 5

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Md. 102; if the principal is released, no matter by whom, the surety is discharged: *Blackburn v. Beall* 21 Md. 208; so, if the principal is released secretly: *Greenlee v. Lowing* 35 Mich. 63.

Griffin, Dickinson, Thurber & Hosmer for defendant in error.

Graves, J. Mr. Coots as sheriff held an execution in favor of Don M. Dickinson and Levi T. Griffin and against Henry Williams, and it being deemed expedient by the judgment creditors that certain goods in the hands of one Coomer should be seized they gave Mr. Coots their bond of indemnity, in which the plaintiff in error and one Cohen were joined as sureties. Mr. Coots collected the execution out of the goods and paid the amount to Griffin & Dickinson. But Coomer sued him for the property so taken and eventually recovered. An execution being issued to the coroner Mr. Coots employed Mr. Conely to take the necessary steps for his protection and the latter immediately called on Mr. Griffin and required that he should provide the proper indemnity as contemplated by the bond. An arrangement satisfactory to Messrs. Griffin & Dickinson, the principals in the bond, and to Mr. Coots, the obligee, was then effected. Mr. Farnsworth, the surety, had no knowledge of it. Mr. Coots paid the execution in favor of Coomer, and his attorney Mr. Conely commenced this action against Farnsworth alone on the bond. The court gave judgment for Coots and Farnsworth brought error.

The chief questions may be traced to the arrangement just mentioned. There are intimations that the actual relations between Messrs. Griffin & Dickinson and Farnsworth were otherwise than as stated in the bond, and that in substance the latter was principal whilst their position was rather that of sureties. But no such suggestions can be regarded. There can be no construction of the case which does not admit that Messrs. Griffin & Dickinson were principals in the bond and Farnsworth a surety.

By the arrangement Messrs. Griffin & Dickinson made

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their check for the indemnity and gave it to Coots' attorney, Mr. Conely, and he immediately commenced this suit in Coots' name against Farnsworth, their surety, for the same amount. The understanding was that this action in Coots' name should be instituted and carried on to enforce collection if practicable of the amount in question from Farnsworth, and that Conely should keep the check and dispose of it finally as the event of the attempt to force collection from the surety should render necessary. If the money should be drawn from him the check would not be needed, and could be restored or replaced. But in case of failure it would be available.

There was evidence for the jury to consider, that the arrangement excluded the bringing of an action against Messrs. Griffin & Dickinson, the principals, and went so far also as to provide that the proceedings should be in their interest. It is not intended to say that there was testimony of express statements of these facts. What is meant is that the details given, together with the reasonable inferences, afforded the evidence which might properly be considered.

In view of this testimony and of the conceded facts as to the nature of the arrangement mentioned, Farnsworth's counsel offered for submission the following two special questions: "*Third*, Is not this suit brought for Griffin & Dickinson's benefit, and not for that of Coots? *Fifth*, Was not this check received with the understanding that Griffin & Dickinson should not be sued on the bond?" The judge refused to leave them to the jury.

As the general charge did not present these points, was it error to decline them? We think it was. Had the jury answered them in the affirmative the court could not properly have given judgment for Coots. It would then have appeared that through agreement between the creditor and the principals, of which the defendant surety had no knowledge, the former had debarred himself from proceeding against the principals; that as against the parties subject to the primary duty to make payment, and on whom it rested to protect and indemnify the defendant, as the plaintiff was

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aware, the obligation had been rendered practically non-enforceable.

It would be difficult to find a more striking instance of a bargain between the principal and creditor for an advantage on behalf of the former than would have been presented. It is needless to trace out the ways in which such a transaction would be obnoxious to the law of suretyship. A "surety engages only to make good the deficiency," and an arrangement between his principals and the creditor without his privity whereby they are no longer suable by the creditor on the contract is a substantial change of the transaction and a prejudicial alteration of its incidents. It becomes unnecessary to refer to other questions.

The judgment should be reversed with costs and a new trial granted.

The other Justices concurred.

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WILLIAM D. WILKINS ET AL. v. CITY OF DETROIT ET AL.

Repaving streets—Legality of paving assessments—Notice to bidders for paving contract—Documentary proofs—Deficiency in record.

Under the paving system followed in Detroit, the contractor is not an indispensable party to a suit against the city to enjoin the enforcement of an assessment.

The city of Detroit has authority to repave streets at the expense of the adjacent property, where there is a necessity for repaving, and the method of procedure is the same as in other paving. No contract for paving can be made until the common council has referred the matter to the Board of Public Works, and received from that board the reports and information provided for in the Public Works Act, as decided in *Butler v. Detroit*, 43 Mich. 552. But an assessment will not be held void when this has been done substantially in accordance with the purposes of that act.

Notices to bidders must contain the substantial requisites of specifications, so that bidders can from such notices obtain the information necessary to enable them to prepare their bids.

Where the determination of the legality of paving assessments depends on documents, the court will not pass upon it without full proof of the

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documents themselves. It will not accept the inferences and conclusions of parties or counsel, but will construe them for itself. *Am. Ins. Co. v. Reed*, 40 Mich. 622, followed.

Where a cause was heard on pleadings and stipulations which did not set out in terms documents necessary to be considered, the decree was vacated and the cause remanded for such further proceedings as should remedy the deficiencies.

Appeal from Superior Court of Detroit. Submitted April 15. Decided April 27.

BILL to vacate assessment. Defendants appeal. Reversed.

Otto Kirchner for complainants.

City Attorney *F. A. Baker* for defendants.

CAMPBELL, J. The bill in this cause was filed by a number of lot-owners complaining of an assessment for repaving Jefferson avenue in Detroit. The case was heard on bill and answer, except as to some matters admitted by stipulation, and the decree below was in favor of complainants.

Among other objections to the bill was one that the contractors for the paving should have been made defendants. This objection, however, was waived by the stipulation to go at once to a hearing on terms agreed on, and unless the omission is absolutely fatal it need not be noticed. It does not occur to us that this is such an omission as renders the case defective in that sense. It was held in *Palmer v. Rich* 12 Mich. 414, that the omission was not such as to prejudice the suit. The practice has been usually to omit them, and under the peculiar system under which these assessments are made, it is very questionable how far the contractors have any rights which must not be worked out as to the lot-owners through city action entirely. There may be some convenience in bringing them in, but we do not think the present case can be held beyond remedy on account of their omission.

It is also insisted on behalf of complainants that there is no authority in the city to repave streets under the charter, and make the expense a burden on the lot-owners. It was

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held by a majority of the court in *Sheley v. Detroit* 45 Mich. 431, that such authority might be lawfully granted, and it was there assumed on both sides that there had been an attempt to grant it. By section 38 of chapter 8 of the charter as amended in 1873, (Laws 1873, Act 270,) it was provided that when the council orders a street to be "graded, or graded and paved, or repaved," it may contract for the work as therein provided; and this is followed by a series of sections regulating assessments. It is true that no change is made in the language of these subsequent sections, and that while they refer to paving there is nothing said about repaving. But the introduction of the word "repaved" as the only change in 1873, indicates, as we think, a purpose to make the whole range of sections on the subject applicable. It is true that sound policy should have placed some check on the power to repave without necessity. But if the other provisions of the charter are faithfully carried out, that abuse will be reasonably restrained. In such matters something must be left to the good faith of the public agencies. We think the power exists.

There are also some very strong averments of fraud in the bill, as perpetrated by the contractors, and at least winked at by the Board of Works, which by the stipulation are waived, so far as they relate to the performance of the contract. So far as they refer to the method of obtaining it, the bill makes no plain averments, and while the method of advertising resorted to is calculated to furnish some facilities to dishonest combination, the record has not been so framed as to charge it, and we presume was not meant to be.

The case, therefore, must depend upon the regularity and formal correctness of the transactions. The history of the business is in brief as follows: Jefferson avenue had already been paved twice at the expense of the lot-owners. On the second day of April, 1880, a number of proprietors and occupants holding land at different points along the line, petitioned the common council of Detroit to have Jefferson avenue repaved nearly its entire length, with cedar blocks in the main traveled part, and gutters and borders of stone. This

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petition the council referred to the Board of Public Works, who, on the 21st of May, 1880, made a report recommending the improvement, and stated that the pavement was about worn out and needed continual repairs. They recommended a pavement of cedar blocks in the center and eight feet of Medina stone on each side of the street.

Thereupon, on the same day, the council divided the work into three sections, and included the lands of complainants in a section between Beaubien street and the railroad bridge, directing a pavement seventy feet wide. Upon receiving a report which the city engineer was directed to prepare and furnish, containing an estimate and statement of the quantity of grading and paving within the district, the Board of Public Works was directed to advertise five days for proposals. It was further provided that the contractors should receive three-fourths of their pay in accordance with the statute allowing bonds to be issued. It is not shown how far the board proceeded under these resolutions.

On the 22d of June, 1880, a number of persons petitioned the council to reconsider the resolutions already passed, and to order a pavement of cedar blocks without stone borders or gutters. At this meeting the Board of Public Works, acting without any previous authority or request, sent in a set of specifications for paving with cedar blocks—as they stated—"in accordance with the expressed wish of the property owners on said avenue." This report came in simultaneously with the new petition.

The council then rescinded the old resolutions, approved these specifications, and adopted a new set of resolutions of the same tenor except as to the material, which was to be cedar blocks.

The Board of Public Works advertised for proposals, referring to plans and specifications on file, and not setting them out in the notice. On the 9th of July the Board reported that proposals had been received and rejected as excessive. The council then ordered the Board to re-advertise for three days. July 16 a report was made of the rejection of new proposals on the same ground, and the

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Board recommended that the work be abandoned, unless contractors could be found to do it at a reasonable price. The mayor subsequently suggested a further advertisement, and a delay of a year if this should not be successful. The council on July 23d adopted a resolution directing a re-advertisement for five days. The Board thereafter reported William J. McGonegal as lowest bidder, and recommended that a contract be awarded him, which was done in due course.

The subsequent proceedings alleging frauds and defaults are for the purposes of this hearing waived.

The objections chiefly relied on are the omission of statutory requirements.

The failure to submit the proposed improvement to the Board of Public Works for estimates and recommendations would probably have brought this case within that of *Butler v. Detroit* 43 Mich. 552, if it had not been for the remarkable series of transactions which, sooner or later, brought about all of the statutory conditions. While it is difficult to understand how some of these steps were taken, yet it does, we think, appear substantially that the Board of Public Works understood and distinctly recommended the precise pavement contracted for, and the council had before it complete specifications. It also appears that before the final advertising the Board had twice laid before the council the bids for all the work as received, with their opinion that they were excessive, and a recommendation of postponement unless better terms could be made. This was certainly definite information as full as could probably have been given in any other way, and the subsequent action of the council was had in as full light as the statute requires. While all this was irregularly done, we are not prepared to say on this record that the mere irregularity should avoid the tax. We are bound to consider somewhat the manner in which these questions are presented, concerning which we shall make further remark presently.

It is also objected that the charter requires the publication of specifications, as well as the other requisites of a notice

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to bidders. It declares that "no paving contract" (or other contract specified) shall be made until advertised proposals and specifications therefor shall have been duly published in at least one daily newspaper published in said city, and for such period as the common council shall prescribe." The city ordinance, chap. 35, § 5, requires the Board of Public Works to advertise fifteen days in the official paper, unless otherwise ordered.

The defence claims that the section in the Board of Public Works act, which declares that "the board shall advertise for proposals to execute the work according to plan and specifications" (§ 18), supersedes the charter. But we do not think it was the design of this section to repeal the charter and leave the Board to its own discretion. The two are parts of one scheme, and the ordinance shows this to be the understanding. In the present case the Board advertised for three days in one instance, and for five in others, not of its own motion but because the council so directed.

This language is very clear, and we think it is in the same direction with much State and congressional legislation which requires notices for proposals to furnish bidders full knowledge of what they are to bid upon, without requiring a personal visit to any office where there may be difficulty, among many bidders, in consulting the one set of documents conveniently, and where persons under bodily weakness could not always consult them at all. It is to be borne in mind that this section applies to all contracts alike, and in some cases bidders may be numerous.

But it does not follow that such a notice is to contain all the verbiage which is often, and probably was here, set out in a formal document called specifications. In a paving contract all the essentials to inform bidders might easily be contained in a very few lines.

But we meet on this record with a difficulty which interferes with this inquiry. In a suit the consequences of which are serious if an assessment is held bad, the court ought to have before it all the documents on which the cause depends, and determine from those just what has been done. This

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case is not before us on bill and answer in the ordinary way, but as to certain things depends on the stipulation which waives some facts, and establishes others. It is altogether probable that counsel may have given in their pleadings correct deductions from the action of the various bodies involved. But we feel that we may not fully understand the precise action taken, when neither bill nor answer undertakes to recite it at large, or to do more than state what it was in given particulars. We cannot properly accept the opinions of counsel or parties concerning the legal meaning of documents, which if read by ourselves would enable us to form our own conclusions, which might or might not be the same. *American Ins. Co. v. Reed* 40 Mich. 622. If this case had been at issue on pleadings and proofs, and the documents omitted, no decree could be safely made in a case involving such important interests until they should be produced.

We cannot properly, under these circumstances, express any views as to the probable questions that may arise on reading these documents. But it cannot escape notice that the necessity of the work, the sufficiency in time and manner of the notices, the action of bidders and of the authorities in accepting or rejecting bids, may all become involved in such a way that our present impressions from this record might be modified.

We think no decree should be rendered on this imperfect showing, but that the decree should be reversed, and the cause remanded with liberty to both parties to amend their pleadings if they choose, and for complainants to reply to the answer, and for proofs. Costs will not be given now to either party, but on a final hearing may be determined as shall be just. The record will be remanded accordingly.

The other Justices concurred.

Afterwards, at the June term, 1881, this case came before the Court upon a record not essentially different, and was submitted on briefs by the same counsel. Submitted June 15. Decided June 22.

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MARSTON, C. J. We have examined the record in this case and find nothing upon which a conclusion different from that arrived at when the case was here before can be based.

The decree of the court below must be affirmed with costs.

The other Justices concurred.

TOWNSHIP BOARD OF HAMTRAMCK v. JAMES HOLIHAN.

Removal of school director by township board—Disqualification through personal interest.

Comp. L. § 3618 in providing that the township school director shall keep the necessary school-house furniture in due order and condition, and that his expenses shall be subsequently audited and paid, does not intend that money must be put into his hands beforehand.

The township board is exclusive judge of the facts on which it is authorized by Comp. L. § 3695 to remove a school director, and its proceedings can only be reviewed by the circuit and Supreme courts on questions of law.

Proceedings to remove a school director for refusing to recognize the validity of a teaching contract were taken by a township board one of the members of which was related to a third person who had a contract subject to the same objections. *Held* that this did not legally disqualify the member from acting on the case actually before the board.

Error to Wayne. Submitted April 15. Decided April 27.

PROCEEDINGS by township board to remove school director. The order of removal was reversed on *certiorari* and the board brings error. Judgment set aside.

Alexis C. Angell and *Hawley & Firnane* for plaintiff in error. The Supreme Court cannot inquire into the facts on *certiorari*: *Cicotte v. Morse* 8 Mich. 424; *Jackson v. People* 9 Mich. 111; *Hyde v. Nelson* 11 Mich. 353; *Linn v. Roberts* 15 Mich. 423; *Brown v. Blanchard* 39 Mich. 790; *Berry*

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v. Lowe 10 Mich. 9; *Welch v. Bagg* 12 Mich. 41; *McGraw v. Schwab* 23 Mich. 13; *Overpack v. Ruggles* 27 Mich. 65.

Stewart & Galloway for defendant in error. A member of a township board cannot take part in proceedings to remove a director if he is interested in the subject: *Stockwell v. White Lake* 22 Mich. 341.

GRAVES, J. The board removed Mr. Holihan from the office of school director and the circuit court on *certiorari* reversed the order of removal. This writ of error was then brought against that judgment.

The authority on which the board acted is expressed in the law concerning primary schools as a power "to remove from office, upon satisfactory proof, after at least five days' notice to the party implicated, any district officer or school inspector who shall have illegally used or disposed of any of the public moneys intrusted to his charge, or who shall persistently, and without sufficient cause, refuse or neglect to discharge any one of the duties of his office." § 136, p. 24, of School Laws; Comp. L. § 3695, as amended.

The power of the board is confined to these causes. There was no finding distinctly within the first branch of the provision and it would require some straining to construe the determination as it appears of record as an adjudication that Mr. Holihan had "illegally used or disposed of any of the public moneys entrusted to his charge." But concerning the second ground the finding was explicit. The board determined that he had persistently neglected, and without sufficient cause, to have the seats of the school-house repaired, and the first question relates to the materiality of this finding. Was it his business to attend to such matters? The statute leaves no doubt. It imposes the duty on the director to provide and keep in due order and condition the necessary school-house furniture, and provides that his expenses shall be subsequently audited and paid. The statute does not intend that the money must be put in his hands as a preliminary to his action. Comp. L. § 3618; School Law § 48.

The board were the exclusive judges of the facts. It was

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not within the province of the circuit court and is not within the province of this court to go behind the findings and decide on the weight of evidence or draw inferences of fact. The circuit court was confined to the law of the case and this court can go no further. If there was evidence before the board for consideration either for, or for and against the respective constituents of the charge, the result could not lawfully be disturbed on any assumption or belief that the case was misjudged. And there was such evidence. No doubt it was weak, and were the case an open one on the facts it is not unlikely that we should reach a different conclusion. But this consideration cannot avail.

It seems that Mr. Holihan refused to recognize as valid a contract for teaching which had been made with one Stevenson, and determined not to pay him, and that his refusal to draw his warrant on the assessor to pay Stevenson was made a distinct ground of charge against him. It also appears that one Miss Mahoney was under a contract to teach which was subject to the same objections as were made to the contract with Stevenson, and that Patrick Scullen, one of the members of the township board, was her uncle. It was objected on the part of Mr. Holihan that in consequence of these facts Mr. Scullen was not competent to sit.

There was no legal disqualification. Miss Mahoney was not a party, and the fact that her interests might be consequentially affected by the decision because it might touch upon the validity of a contract of the same nature as one she held, was not sufficient to oust her uncle. The collateral and contingent interest she may have had in the event of the controversy was too remote and uncertain to preclude him from sitting. *The Queen v. Manchester, Sheffield & Lincolnshire Rw. Co.* L. R. 2 Q. B. 336; *Wildes v. Russell* L. R. 1 C. P. 722; *Matter of Dodge and Stevenson Manufacturing Co.* 77 N. Y. 101.

As a consequence of the error in overruling the finding for removal under the second ground the judgment of reversal must be set aside with costs.

The other Justices concurred.

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Mary A. Chapin v. Andrew Perrin.

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No appeal lies from a consent order.

Appeals bring up some action of the lower court which is complained of as erroneous. A consent order, therefore, cannot be appealed from, even where it is itself a stipulation for removing the case without costs in order to settle a question of jurisdiction.

Appeal from St. Joseph. Submitted April 15. Decided April 27.

Bill for accounting for trust funds. Complainant appeals. Case dismissed.

H. P. Stewart and *Alfred Akey* for complainant.

H. H. Riley and *O. J. Fast* for defendant.

Cooley, J. This is an appeal in chancery. From the record it appears that the appeal is taken from a decree entered in pursuance of the following stipulation which is signed by the solicitors: "It is hereby stipulated and agreed by and between the solicitors in above entitled cause: 1st. That as the jurisdiction of this court is in doubt, and for the purpose of settling said jurisdiction in the Supreme Court, the demurrer of defendant Andrew Perrin to the bill of complaint may be sustained by the court, and the bill dismissed without prejudice and without costs of any kind to either party; and said complainant agrees to appeal said suit for the purpose above set forth, and upon the conditions hereinafter stated. 2d. That in appealing said suit to the Supreme Court, each party agrees to pay their own costs, and that no costs will be taxed by either party for any costs made by him by reason of said appeal. 3d. It is agreed that this stipulation may be filed with the court in lieu of the appeal bond required by the statute in chancery appeals, and to operate and have the same effect as such bond."

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Appeals bring up for review some action of the court below which is complained of as erroneous. In this case there has been no such action. The chancery court has performed no judicial act whatever, except what is implied in permitting a consent order to be entered. But neither party can complain of a consent order, for the error in it, if there is any, is their own, and not the error of the court. It follows that there is nothing to appeal from, and the case must be dismissed and the record remanded.

The other Justices concurred.

WILFRED M. KELLOGG v. THOMAS LOVELY.

Vendor's lien—Mortgage on breeding mare.

The reason for a ruling is not important in the review of a case, if the result is correct.

The lien on property retained by the vendor covers all its natural incidents and accessories unless circumstances show a different intent.

Where one buys a mare on credit and gives a chattel mortgage on her for the entire purchase price, and she is afterwards found to be with foal which is not weaned before the credit expires, he is not entitled to keep the colt if he makes default in payment and the mare is taken on the mortgage.

Error to Shiawassee. Submitted Apr. 15. Decided Apr. 27.

TRESPASS on the case. Plaintiff brings error. Affirmed.

McBride & Fraser for plaintiff in error.

McKercher & Bush for defendant in error. A mortgage on a mare with foal covers the colt after it is foaled: Herm. Chat. Mortgages 86; Thomas Chat. Mortgages 474; *Forman v. Proctor* 9 B. Mon. 124; *Dunkan v. Chashin* 14 Eng. 418; *Thorpe v. Cowles* 7 N. W. Rep. 649; *Evans v. Merriken* 8 Gill. & J. 39; *Fowler v. Merrill* 11 How. 375.

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GRAVES, J. The circumstances of this controversy are as follows: In October, 1878, the defendant [Lovely] sold the plaintiff [Kellogg] on credit, a mare, buggy and harness for the agreed price of $250, and the plaintiff gave his note together with a mortgage on the property for the entire sum.

The mare was with foal and about the first of June following she dropped the colt. On the first of July the mortgage became due, and Kellogg failing to pay, Lovely proceeded to take the property. There was no dispute about his right to take the mare, buggy and harness, but the parties appear to have differed about the colt. Lovely maintained that the mortgage applied to it and gave him the same right to the colt that it did to the mare, but Kellogg contested this claim and contended that the colt being the offspring of the mare was his property and not having been born when the mare was purchased and the mortgage given was not subject to the mortgage.

The colt had not been weaned and was running with the mare, and when Lovely drove her off the colt followed. Lovely soon afterwards proceeded to sell the whole property, the colt included, under the mortgage, and we gather from the case that it was bought in by him through an agent. The whole sum for which the property was struck off was $176, and shortly afterwards Kellogg paid the remainder of the debt. He then instituted replevin against Lovely, before a justice of the peace, to obtain the colt, and it was seized on the writ and delivered into his possession. The justice entered a nonsuit against him, and Lovely waiving return of the colt the value was assessed at $55, for which Lovely took judgment. An appeal was made and the circuit court reduced the assessment to $30 and awarded Kellogg $78 costs, and extinguished the former by applying an equal amount of the latter by way of set-off. Thereupon Kellogg sold the colt and brought this action of trespass, counting on the transaction when Lovely took the mare on the mortgage. The justice gave judgment in Kellogg's favor for the value of the colt, and Lovely appealed. The circuit judge ruled that there was no evidence of trespass and ordered a verdict

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for Lovely. It is not certain that the circuit judge was correct in the reason on which he proceeded. But whether he was so or not is unimportant unless the result was wrong.

The fundamental question in the case relates to the effect on the legal ownership of the colt, of the sale of the mare to Kellogg and the mortgage back.

In respect to tame and domestic animals the general rule is well understood, that "the brood belongs to the owner of the dam or mother" (2 Bl. Com. 390), but there are many cases in which the rule is qualified in its application. It has been held and may be true in special cases that where the female is hired for a time limited and has increase during the term, the hirer will be entitled to it and not the general owner: 2 Kent 361; Edwards on Bailments § 403; *Putnam v. Wyley* 8 Johns. 432; *Concklin v. Havens* 12 Johns. 314; *Hanson v. Millett* 55 Me. 184; *Stewart v. Ball* 33 Mo. 154. And so too it was decided in *Linnendoll v. Terhune*, that a foal obtained under an agreement by which the owner of the mare arranged with another person that if he would put her to horse and pay the expense he should have the foal, became the property of such person. 14 Johns. 222.

It is also laid down by Judge Story that where a thing is pledged its natural increase as accessory is also pledged, and he gives by way of illustration the case where a flock of sheep are pledged, and observes that the young afterwards born, are also pledged. Bailments, § 292; and see Domat, part 1, book 3, tit. 1, § 1, art. 7; Kaufm. Mackeldey, book 1, § 267. In Iowa and Kentucky, and probably in other States, it has been decided that the young of animals under mortgage are subject to the mortgage (*Forman v. Proctor* 9 B. Mon. 124; *Thorpe v. Cowles* — Iowa —;) and no cases to the contrary have been discovered. Perhaps these last decisions may have originated in the doctrine that the mortgagee of chattels is the legal owner; and the courts may have considered that in holding the young of mortgaged animals to be subject to the mortgage, they were only applying the general rule which assigns the increase to the owner of the mother. But it is useless to speculate on the subject.

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The case before the court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff, not paying anything whatever, gave back at the same moment a chattel mortgage for the entire price. There was no interval of time between the sale and mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not, as between them, to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever fairly belongs to the thing in question, as the young the dam is carrying belongs to her, ought to be as fully bound as the thing itself, unless indeed there are circumstances which imply a different intention.

It is not unreasonable to construe the acts of these parties by these principles and to consider that when Lovely sold the mare without receiving anything down, and Kellogg gave back the mortgage for the whole purchase price to be due before the colt, according to the ordinary course of things, would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intendment is a fair and just one that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale. According to this view there was the same right to the colt as to the mare, and the act of seizure sued for was not a trespass.

The result ordered by the circuit judge was therefore correct, and the judgment must be affirmed with costs.

The other Justices concurred.

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JAMES F. ADAMS v. JOHN NIEMANN AND EMIL JOCHEN.

Indemnity mortgage—Fraudulent intent—Separate debts.

A mortgage is not fraudulent that is taken, without fraudulent intent, to secure no more than the mortgager's actual debt.

A partially wrongful purpose may invalidate a mortgage; and when taken by two mortgagees, the honesty of one will not help it if the other commits any fraud or wrong in taking it.

A mortgage to several persons jointly may be made to cover separate debts.

A mortgage is not necessarily made directly to the beneficiary; the security is always made in trust to secure obligations, and the trust and beneficial interest need not be in the same hands; a mortgage to a third person is as valid as if made to a creditor.

An indemnity mortgage is valid if honestly and fairly given; and if merely an indemnity to the extent of securing the mortgager's debts more directly, and made with the express concurrence of the creditors who hold them, it is not void as against creditors.

Error to Saginaw. Submitted Apr. 15. Decided Apr. 27.

ASSUMPSIT. Defendant brings error. Affirmed.

Tarsney, Tennant & Weadock for plaintiff in error. Each mortgagee can enforce his own claim under a mortgage for separate debts: Herm. Chat. Mortgages 357; *Burnett v. Pratt* 22 Pick. 556; *Gilson v. Gilson* 2 Allen 115; a mortgage which is partly for indemnity will be invalid as against creditors if the whole sum secured is described as debt; *Belknap v. Wendell* 31 N. H. 92.

Eugene Wilbur and *Albert Trask* for defendants in error. A joint mortgage securing separate debts may be foreclosed by the mortgagees jointly: *Wheeler v. Nichols* 32 Me. 233; *Howard v. Chase* 104 Mass. 249.

CAMPBELL, J. Niemann and Jochen brought an action of trover against Adams as sheriff of Saginaw county for the

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conversion of a stock of goods on which they held a chattel mortgage given by Ernest Jochen, against whom Adams held executions. The sale was made in opposition to the rights of the mortgagees, and with knowledge of their claims, which the sheriff refused to recognize. They recovered judgment below to the amount of their mortgage, which was less than the debts secured by it.

The defense below rested on the alleged invalidity of the mortgage on grounds relating to its formal sufficiency as joint in form, as well as to its construction. An attempt was also made to assail its good faith.

It is claimed the court erred in saying to the jury that the levy could not prevail "if the mortgage was given to secure an honest transaction, debt or liability, and if it was not given for the sole purpose of hindering and delaying the other creditors of Ernest Jochen."

If this had been the entire charge on this subject, it is undoubtedly open to misapprehension. We have no doubt a partially wrongful purpose may be such as to stand in the way of such a security. But the court in giving further instructions put it beyond any doubt that there was no erroneous conclusion justifiable under the whole charge. It was clearly and distinctly laid down that honesty on the part of one of the mortgagees would not save the instrument if there was any fraud or wrong in the other. And the jury by special findings made the instruction unimportant. They found expressly that neither of the mortgagees took the mortgage with any unlawful intent. And they further found that the debts intended to be secured were somewhat larger at the date of the mortgage than the whole sum secured, which was five thousand dollars. A mortgage taken without fraudulent intent to secure no more than the actual debt of the mortgagees is not open to any attack as fraudulent.

The chief defence seems to have rested on other grounds. The mortgage was made to Niemann and Emil Jochen jointly. But the debts intended to be secured were not joint but several. Niemann had two claims,—one for a personal

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debt debt due to himself originally, and one covering liabilities which he had undertaken for Ernest Jochen to other creditors. Emil Jochen also had a personal claim. It is insisted that a joint mortgage cannot be made to cover separate debts.

We do not think there is any legal objection to such a mortgage. We have already held, at this term, that a policy of insurance may be taken jointly to secure property owned in severalty. *Castner v. Farmers' Mutual Fire Ins. Co.* ante p. 15. It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. A mortgage to a third person would be as valid as a mortgage to a creditor. The choice of a mortgagee is a matter of convenience, and there can be no wrong, and there may be some advantage, in giving to all of the secured creditors a control over the security in which all are ratably interested, and it would effectually prevent any disputes as to priority.

It is also objected that the mortgage gave no such interest in regard to the portion of Niemann's claim that arose out of his having become security for the mortgagor, until it was shown he had paid the debts. It is enough on this point to say that by the terms of the mortgage, the mortgagees were entitled to sell the property unless payment of the amount secured was made by January 1, 1880. This suit was brought some months thereafter.

Moreover we do not think the evidence tended to show that the mortgage was merely for indemnity on this portion of the liabilities. It rather tends to show that it was to secure those debts more directly, and was made with the express concurrence of the creditors who held them. And even if it had been to this extent an indemnity merely, that would not make it wholly or partially void as against creditors. An indemnity is valid if honestly and fairly given.

We think there was no error in the judgment, and it should be affirmed with costs.

The other Justices concurred.

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ADAM REINIG v. SAMUEL MUNSON, DRAIN COM'R ET AL.

ANGELINE ALLEN v. SAMUEL MUNSON, DRAIN COM'R ET AL.

Drains—Notice—Appointment of commissioners.

Proceedings to lay out a ditch are fatally defective if there is no affirmative showing that notice was given of the application to the probate court for the appointment of commissioners to assess damages, and of their appointment.

Certiorari. Proceedings to lay out a township ditch. Submitted April 15. Proceedings quashed April 27.

Tarsney, Tennant & Weadock for plaintiffs in certiorari.

MARSTON, C. J. The proceedings in each of these cases are fatally defective in that no notice appears to have been given of the application to, and appointment of commissioners by, the probate court. The necessity of the proceedings showing affirmatively that such notice was given has been decided so often that it does seem as though the law in this respect should be known and observed more generally than it seems to be. The proceedings in each case must be quashed and held for naught.

The other Justices concurred.

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FRANCIS ALTER, RELATOR v. EDWARD W. SIMPSON OR THE COMMON COUNCIL OF DETROIT.

Common council—Credentials of aldermen.

Where the common council is made the final judge as to the election of its members, the Supreme Court cannot review its decision on the facts.

Motion for mandamus, quo warranto or certiorari, to determine relator's right to a seat in the Common Council of

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Detroit, claimed by respondent Simpson, whose claim was supported by the Council. Submitted April 26. Denied April 27.

Maybury & Conely for the motion.

Per Curiam. The office in question in this case is that of alderman of the city of Detroit. The question is whether this court can review the decision of the council in determining, upon the facts, that the respondent was elected. On a similar case we have held that we have no power to interfere. *People v. FitzGerald* 41 Mich. 2.

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THOMAS MUNN, IMPLEADED WITH JAMES J. BOYCE v. JACOB P. HAYNES.

Action on joint contract—Service beyond jurisdiction—Discontinuance as to joint promisor—Pleading in abatement.

Service of a declaration beyond the jurisdiction may be made by private persons.

Where service on defendants within the jurisdiction must be proved before service is made on a joint defendant outside of it, but is not shown by the return, an amended return not filed until after all have been served, but showing that service was made on resident defendants first, is not important.

Service on a joint defendant beyond the jurisdiction was held valid where the return showed that service on the other defendants was made earlier and that the service beyond the jurisdiction was made on the date of the return.

Discontinuance as against a party charged as a joint promisor discharges a co-defendant against whom judgment has been taken by default, because it leaves the case resting on the allegation of a different contract from that on which judgment was taken.

Suit cannot be brought against an individual party to a joint contract, and judgment taken upon it, without giving the defendant an opportunity to plead non-joinder in abatement.

The right of pleading in abatement is an absolute and valuable right.

A declaration setting up a joint obligation will not sustain recovery unless a joint debt is proven, and failure to prove the claim as against one defendant is as fatal as not to prove it against any.

A discontinuance as against a joint promisor is allowable only where he was incompetent to contract, or has been discharged by bankruptcy or the statute of limitations or something that has not discharged his co-defendants.

Judgment by default on an allegation of joint liability does not admit any different liability.

Error to St. Clair. Submitted April 6. Decided June 8.

ASSUMPSIT. Defendant brings error. Reversed.

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A. C. Maxwell and *William T. Mitchell* for plaintiff in error. Defendants within the jurisdiction must be served before joint defendants outside of it can be brought in: *Denison v. Smith* 33 Mich. 155; if service on the latter is made on the same day it must be shown that the former were first served: *Clark v. Lichtenberg* id. 307; *Dunn v. Hazlett* 4 Ohio St. 436; *Allen v. Miller* 11 Ohio St. 374; *Pottinger v. Mayfield* 14 B. Mon. 647; in a suit on a joint undertaking all the obligors must be made defendants: Coll. Part. § 717; *Burgess v. Abbott* 6 Hill 135; *Harwood v. Roberts* 5 Greenl. 441; and if one pleads *non est factum* and the action is dismissed as to him, judgment by default cannot be taken: *Hickman v. Anderson* 2 Dana 223; a discontinuance as to one applies to all: *Hall v. Rochester* 3 Cow. 374; judgment against one of three joint obligors was vacated for want of authority to enter it severally: *Bank v. Sharpe* 5 Harr. (Del.) 170.

Whipple & Voorheis for defendant in error. The omission to make joint obligors co-defendants must be taken advantage of by plea in abatement, unless it appears that the party not impleaded is still living: 1 Green Pr. 92; *People v. Dennis* 4 Mich. 609; *Achey v. Hull* 7 Mich. 423; *Hinman v. Eakins* 26 Mich. 80; *Perrin v. Lepper* 34 Mich. 294.

Campbell, J. Haynes brought suit in St. Clair county against Thomas and Sarah E. Munn and James J. Boyce as joint makers of a promissory note which Thomas and Sarah were alleged to have signed as partners under the name of Munn & Co. Service was made on Boyce and Sarah E. Munn on the 24th and 25th of July, 1879, and proof filed July 26th. On the 26th of July service was made on Thomas Munn in Bay City. Subsequently, on the 10th of January, 1880, the sheriff of St. Clair who served the declaration in his own county, was allowed to amend his return by dating it July 24, 1879, and stating he could not find Thomas Munn in his bailiwick. This amendment is however of no importance, as the other defendants were served

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before Thomas, and if this return was not filed before January, 1881, it is difficult to see how it is any better than the other, if the facts in it should have been of record before service on Thomas Munn.

Sarah Munn defended and put in the general issue with an affidavit that she never executed the note and was not a member of the firm. The other defendants were defaulted. On the 9th of September, 1879, the default was made absolute, and an order entered for assessment by the clerk. On the 25th of October plaintiff by leave of court amended his declaration by striking out the name of Sarah E. Munn. The amendment was not made in fact, and the order is confined to this permission. On the same day the clerk assessed the damages, and the court gave judgment. Thomas Munn brings error.

The errors relate to the service of process, and the discontinuance.

We have no doubt service of declaration may be made by private persons. Such has been the practice here, and in New York. Graham's Practice, 459. We are also of opinion that inasmuch as service was actually had on the other defendants before Thomas Munn was served, the service on him was valid, and it may be presumed the return was made when he was served, as it bears date then and the service in St. Clair was earlier.

But we think that the discontinuance as against a party charged as a joint promisor could not properly be made so as to bind him by this judgment. It leaves the case to stand on the allegation of an entirely different contract from that on which he was defaulted.

A plaintiff cannot sue a person solely on a joint contract and proceed to judgment on it, without giving him a right to plead non-joinder in abatement if he chooses. This right of pleading in abatement is an absolute right, and is considered in law as a valuable one. Upon a joint judgment in contract there are mutual rights as well as mutual obligations.

Upon a declaration setting up a joint obligation there can be no recovery unless a joint debt is proved, and failure to

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prove a claim against one is as fatal as failure against all.' 1 Chitty's Pleading, 35, 36. This doctrine has been uniformly recognized.

In *Candee v. Clark* 2 Mich. 255, it was held there could be no discontinuance against one of two joint debtors. In *Wetherwax v. Paine* id. 555, it was held that garnishee proceedings against less than all joint debtors were absolutely void, and no bar to a subsequent suit against all. In *Winslow v. Herrick* 9 Mich. 380, it was held a joint and several demand could not be sued on as the joint obligation of less than all, and a discontinuance as to the parties not defaulted was held to invalidate a judgment against those defaulted. The same doctrine is illustrated in *Mace v. Page* 33 Mich. 38; *Larkin v. Butterfield* 29 Mich. 254; *Wellover v. Soule* 30 Mich. 481; *Lee v. Bolles* 20 Mich. 46; *Ballou v. Hill* 23 Mich. 60; *Cruikshank v. Gardner* 2 Hill 333.

It is only where the contract was actually made by all the parties, but one was either incompetent to make it as from infancy or other disability, or has been since discharged by something which is not a discharge of the rest—as bankruptcy, limitation, or the like—that such discontinuance is available and allowable. *Hartness v. Thompson* 5 Johns. 160; *Reading v. Beardsley* 41 Mich. 123; *Anderson v. Robinson* 38 Mich. 407; *Taylor v. Dansby* 42 Mich. 82.

The default having been taken as a default on a charge of joint liability with Sarah Munn, was no admission of any other liability, and the discontinuance changed the issue without giving plaintiff in error a chance to be heard on the new form of the charge.

The judgment was erroneous and must be reversed with costs as to Thomas Munn. Boyce has severed and does not complain here.

Graves, J. Thomas Munn, Sarah E. Munn and James J. Boyce were made joint defendants and charged as joint promisors, and according to the common law no recovery was possible except on proof or admission of the same joint promise which was averred. The plaintiff could not shift

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his ground and say that Sarah E. Munn was not after all a joint promisor, and thereupon drop her by *nol. pros.* and proceed against the other two. 1 Chitty's Pl. 50, 51, 52; Gould's Pl., ch. 4, §§ 115, 116. And according to the same doctrine the only effect of the suffering default by Munn and Boyce was their admission of the same promise the plaintiff would have been bound to prove against them in case they had pleaded a general traverse to the declaration, and hence a promise by them jointly with Sarah E. Munn. *Sheehy v. Mandeville* 7 Cranch 208. Their admission of that cause of action was not convertible by election of the plaintiff into an admission of another unlike it on which to found judgment. They were bound by what they admitted, but were not liable to be held on a distinct ground which had neither been set up nor admitted. Before being made answerable for a new promise they were entitled to their day in court with opportunity to offer such defense as they chose. No court could have any right to assume that they had no defense and so arbitrarily deny them the chance to say for themselves whether they had or not. It would be contrary to first principles and in derogation of "due process of law."

There had been neither adjudication nor proof that Sarah E. Munn was either not a joint promisor or that she was personally exempt from liability. They could not be legally denied opportunity to plead her non-joinder by the *ex parte* act of the plaintiff. But the striking her out without any admission or decision that she was not jointly liable, and going to judgment against them on nothing else than their admission of having undertaken jointly with her as alleged, deprived them of that right. Moreover it involved the founding of judgment on a fallacious basis—the basis of being a joint undertaking of the three defendants and no personal exemption of either, and the conclusion of law, a judgment against two and the acquittal of the third. Had the action been originally against the two alone they could have pleaded the non-joinder of the third, and their omission to plead it would have been a waiver entitling the plaintiff

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to recover against them alone. But there has been no waiver. No chance to plead non-joinder has been given, and no one can be said to waive the exercise of an election who is denied opportunity.

The rule permitting a discontinuance as to some of the defendants in certain cases (Rule 71) is based on subd. 8 of § 4912, Comp. L. p. 1502, and the statute measures the scope of its application where it says it may be allowed "when it can be done consistently with justice." *Yawkey v. Richardson* 9 Mich. 529. The regulation appears to accord with one in the English common-law procedure act, (2 Chitty Pl. 269,) and it is probably not unlike a provision in the practice act of Massachusetts. *Bliss v. Bliss* 12 Met. 266.

In the early cases of *Winslow v. Herrick* 9 Mich. 380, and *Yawkey v. Richardson*, supra, this court so construed the rule as to restrict its application and prevent it from being used except for the purpose of obviating mere technical objections, and the court in Massachusetts seems to have taken the same view. *Bliss v. Bliss*, supra. And according to the principle of these cases the practice below was wrong. The English courts appear to have given a wider application to this statute, but still not wide enough to sustain this judgment. In *Greaves v. Humphreys and another* an attorney sued two on an alleged joint retainer, and one suffered default. At the trial of the issue joined by the other the evidence proved a *separate retainer*, and the plaintiff moved to amend by striking out the defendant who had *suffered default*. The judge doubted the right, but concluded to allow it, and the court *in banc* (Q. B.) sustained the ruling and observed that the case stood as though the defaulted party had never been in. 30 E. L. & E. 256.

Here it was the defaulted defendant who was dropped, and the change was only made when it was regularly ascertained that there was no joint promise and that the defendant pleading and going to trial was individually liable.

In *Johnson v. Goslett* (C. P.) the cause was for money had and received, against seven defendants. One of the number named Johns allowed judgment to go by default. On the

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trial with the others it became a question whether two of their number could be held at all, and the plaintiff proposed to strike out their names, but this was objected to on behalf of their associates, on the ground that the defendant Johns had suffered default. The questions were brought before the full court and it was decided that the amendment was admissible. The court thought the two defendants were liable with the rest, and therefore that the amendment was uncalled for; but as a court of error would not have power to allow it and the case was to be carried there, the amendment was made. 37 E. L. & E. 308.

According to the report of this case the court seems to have thought that the default of Johns would not prevent a discontinuance as to some of the others who defended. But it would seem that the proof was full to show that Johns was jointly liable with all the others except the two, and there seems to have been no complaint on the part of Johns. The report does not show that any question was raised concerning his right or the effect of his default as an admission. In the case at bar the plaintiff no doubt had the right to amend by striking out the female defendant. But the proper practice was to serve the amended declaration on the defaulted defendants and give them opportunity to contest the right to proceed against them alone.

I think the result stated by my brother Campbell is correct.

MARSTON, C. J. and COOLEY, J. We concur in the result.

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MARGARET GIBBONS v. JOHN DUNN—SAME v. WILLIAM DUNN—SAME v. MICHAEL DUNN.

Burden of proving grantor's incompetency.

On a bill to set aside a deed for the grantor's incompetency, the burden of proving incompetency is upon the complainant, whose case fails if the evidence is so evenly balanced as to leave the question in doubt.

Appeals from Wayne. Submitted Apr. 7. Decided June 8.

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BILLS to set aside deeds. Defendants appeal. Reversed; bills dismissed.

Moore & Moore and *Charles M. Swift* for complainant.

Levi T. Griffin (*Griffin, Dickinson, Thurber & Hosmer*) for defendants.

MARSTON, C. J. The complainant seeks to have a deed executed by her father in 1869 to the defendant set aside because of the incompetency of the grantor at the time of executing the instrument.

In 1874 complainant's father conveyed a certain other description of land to another son, William Dunn, and the same year a third piece of land to his son Michael Dunn. Separate bills were filed against each of these parties to have these deeds set aside and for the same reason, and in each case a decree was rendered in favor of complainant, from which appeals were taken by the defendant in each case.

The cases were heard together upon pleadings and proofs. A large number of witnesses were examined in favor of the complainant, and the evidence given by them tended very strongly to show that the grantor, now deceased, was at the time of executing the conveyances in question incompetent and not capable of doing any business. On the part and behalf of defendants a still larger number of witnesses were called who, many of them having had equal opportunities with those called by complainant, agree in saying that at the time these several instruments were executed the grantor was fully capable and competent to do business, and they testify to having seen and had conversations with him, and some of them to doing business with him.

In my opinion the weight of the testimony is in favor of the grantor's competency and the validity of the conveyances. The burthen of proving incompetency is upon the complainant, and if the case was left in doubt, she must fail, as conveyances, when made and acted upon, should not be set aside upon slight and uncertain evidence.

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I am of opinion that the decrees in the court below should be reversed, and a decree entered in each case, dismissing the bill of complaint with costs.

The other Justices concurred.

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ALEXANDER T. CAMPAU v. SIDNEY D. MILLER.

Claims against estate—Subrogation to rights of claimant.

One who has been compelled to pay a certain sum on behalf of persons who, when it should be paid, would be entitled to indemnity therefor from an estate, is entitled to be subrogated to the latters' rights and may file his own claim, for the amount he has paid, directly, against the estate.

Commissioners on the estate of a deceased person cannot allow contingent claims; they can only receive and report the evidence relating thereto, and such claims are not definitely adjudicated until they are supposed to have become absolute.

Error to Wayne. Submitted April 7. Decided June 8.

APPEAL by Alex. T. Campau, an heir of Theo. J. Campau, from a probate order allowing a claim against the estate. Claimant had judgment. Appellant brings error. Reversed.

Moore & Moore for plaintiff in error.

John H. Bissell for defendant in error.

COOLEY, J. Miller, the defendant in error, had a contingent claim against the heirs of Matilda V. Chapaton, which became absolute in his favor in January, 1880, when he was compelled to pay on their behalf the sum of $1105.95. When they should pay this, the heirs claimed that the estate of Theodore J. Campau was bound to indemnify them; and in the preceding November they presented to the probate court a petition that their claim to indemnification be allowed as a contingent claim against the Campau estate: The probate court permitted the claim to be referred to commissioners,

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who reported upon it as follows: "Amount of their contingent claim as per their petition to which we hereby refer, $700, and interest from October 4th, 1872." Whether the commissioners reported the evidence given in favor of the claim we are not informed.

This action of the commissioners appears to have been considered an allowance of the claim contingently, so that when the liability of the Chapaton heirs became definitely fixed afterwards they were entitled on the basis of it to indemnity. Acting on this supposition Miller, instead of calling upon the Chapaton heirs to pay him what he had been compelled to pay in their interest, filed his claim directly against the Campau estate, asking that he be subrogated as against that estate to the rights of the Chapaton heirs, and that the sum he had paid be allowed to him. The circuit court on an appeal being taken to it, made the allowance, and the case comes before us on a writ of error.

The case is a very proper one for subrogation, inasmuch as it saves for the Campau estate the cost of one suit if its liability is finally established. But in respect to the proofs there are some errors in this case which render it impossible to sustain the order of the circuit court. In that court the liability of the Campau estate was not proved otherwise than by putting in evidence the action of the commissioners upon the contingent claim. Unless therefore that action was an allowance of the claim contingently, it has never been judicially determined that the Campau estate is liable at all.

It is manifest, we think, that the parties have overlooked the case of *Buchoz v. Pray* 36 Mich. 429, in which pains were taken to show that commissioners on the estates of deceased persons have no power to allow contingent claims. Their authority is limited to receiving and reporting the evidence; and the case then stands until the claim is supposed to have become absolute, when for the first time it may be definitely acted upon and adjudicated. It was therefore not sufficient for Miller to show that the Chapaton heirs had

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become liable to him: he must go farther and put in such evidence as will make out their right to indemnity.

The order of the circuit court must be reversed with costs, and the case remanded for a new trial.

The other Justices concurred.

46 150
87 450
46 150
103 286
46 150
127 459

CHARLOTTE CUMING v. CITY OF GRAND RAPIDS.

Assessment for grading streets—Injunction against collection of tax.

The right to deal with a public improvement as a whole, in assessing property benefited by it, is determined by its unity and not simply by the fact that the street through which it extends is called at different points by different names. And a resolution declaring the necessity of grading a particular street may properly include branches thereof which surround a space that lies across the way but which really constitute a part of the thoroughfare.

Error in the exercise of an undisputed power to levy an assessment cannot be presumed from ambiguous facts.

A resolution of a common council declaring the necessity of a street improvement, is not invalidated by including "the necessary bridges, culverts," etc., without specifying what is necessary, especially if it does not appear that anything is necessary beyond the improvement of the street; the resolution does not delegate authority to decide upon the necessity, as details may afterwards be settled by the council.

A charter provision that the Board of Public Works shall estimate the cost of a proposed public improvement and report it to the common council before an assessment is made therefor, is sufficiently observed if the board adopts, approves and reports to the council an estimate made by the city surveyor.

A bill to enjoin the collection of a street tax because the estimate of its cost, as submitted to the council, was in gross, should clearly negative the submission also of information in detail.

A bill in equity to restrain the collection of a tax cannot be aided by any presumption against the correctness of official action.

Whether an assessment for a public improvement is invalid because the estimate of its cost was submitted in gross and not in detail, and whether, if the estimate was adopted, any question can afterwards be raised—*Q.*

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The cost of engineering and printing are legitimate expenses incident to a public improvement, and are properly included in the assessment therefor.

The action of a majority of a city board of equalization and review in making an assessment for the improvement of a street, is legal if all members of the board were notified of the meeting at which it was taken. Comp. L. § 2.

Where a contract refers to a plan, specifications and profile, and makes them a part of itself, and they are not given in the record, it cannot be presumed, in a suit in equity, that they do not supply apparent omissions from the contract.

Appeal from Kent. Submitted Apr. 7. Decided June 8.

BILL to enjoin collection of special assessment. Complainant appeals. Dismissal affirmed.

John S. Lawrence for complainant. In proceedings to grade a street the revised charter of Grand Rapids (Act 282, Loc. Acts 1877, tit. vi. §§ 2–6) declares the following steps jurisdictional: the declaration of necessity: *Hoyt v. East Saginaw* 19 Mich. 39; *Starr v. Burlington* 45 Ia. 87; the estimate of cost; *Workman v. Chicago* 61 Ill. 467; *Myrick v. LaCrosse* 17 Wis. 442; the resolution locating the assessment: *Warren v. Grand Haven* 30 Mich. 24; the order directing the assessment, and the return; *Merritt v. Portchester* 71 N. Y. 309; jurisdiction ceases with any failure to comply with the statutory requirements: *Hopkins v. Mason* 61 Barb. 469; conditions precedent may not be omitted: Dill. Mun. Corp. § 610 n.; *Mix v. Ross* 57 Ill. 125; *Adriance v. McCafferty* 2 Rob. (N. Y.) 153; doubts of the existence of the power are determined against the municipality: Dill. Mun. Corp. § 55 n; *Minturn v. LaRue* 23 How. 435; Potter's Dwar. on Stat. 213, n 25; the empowering statute must be construed strictly: *Newell v. Wheeler* 48 N. Y. 486; *Sharp v. Speir* 4 Hill 76; *Striker v. Kelly* 2 Den. 323; a municipal council has no right to declare the necessity of grading portions of more than one street in one resolution: *Arnold v. Cambridge* 106 Mass. 352; *Wright v. Briggs* 2 Hill 79; lot owners cannot thus be made liable for

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assessments to which they would not be subject if the proceedings were separate: *Thomas v. Gain* 35 Mich. 163; *Dorgan v. Boston* 12 Allen 237; *Weckler v. Chicago* 61 Ill. 149; Cooley on Taxation 441; culverts, etc., are not included by implication with the grading of a street as a portion of the same improvement: *Knox v. Yonkers* 39 Barb. 266; a municipal council cannot delegate to a board of public works its discretionary power to increase or decrease a street tax: *Foss v. Chicago* 56 Ill. 354; *Lyon v. Jerome* 26 Wend. 485; *Thompson v. Schermerhorn* 2 Seld. 92; *Chilson v. Wilson* 38 Mich. 267; *People v. St. Clair* 15 Mich. 85; *Birdsall v. Clark* 73 N. Y. 73; *In repetition of Emigrant Savings Bank* 75 N. Y. 388; *Hydes v. Joyes* 4 Bush 464; Burroughs on Taxation 482; where an improvement is for an æsthetic rather than a practical purpose the expense should rest on the general public: Cooley on Taxation 428; *Allen v. Drew* 44 Vt. 188; *In re Washington Ave.* 69 Penn. St. 363; *Louisville v. Rolling Mill Co.* 3 Bush 423; the entire board must unite in the *quasi* judicial act of determining the benefits: *Geter v. Commissioners* 1 Bay (S. C.) 354; *Ballard v. Davis* 31 Miss. 525; *Scott v. Detroit Young Mens' Society* 1 Doug. (Mich.) 119; assessments are invalid if not made by the proper persons: *Todd v. Todd* 5 Thomp. & C. 531; where illegalities appear in that portion of tax proceedings which precede the execution of the tax deed, the deed perpetuates a cloud on title for which equity gives a remedy: *Scofield v. Lansing* 17 Mich. 437; *Palmer v. Rich* 12 Mich. 414; High on Injunctions § 525.

City Attorney *William J. Stuart* and *Stuart & Sweet* for defendants. Equity will not enjoin a levy on personalty to collect a tax: *Hagenbuch v. Howard* 34 Mich. 1; though it would restrain the collection of illegal taxes which established an apparent lien on land: *Marquette, Hought. & Ont. R. R. v. Marquette* 35 Mich. 504; *Scofield v. Lansing* 17 Mich. 437; but since Act 118 of 1873 which requires the deposit of the tax in court as a preliminary to suing out an injunction the remedy is complete at law, and the tax-payer can

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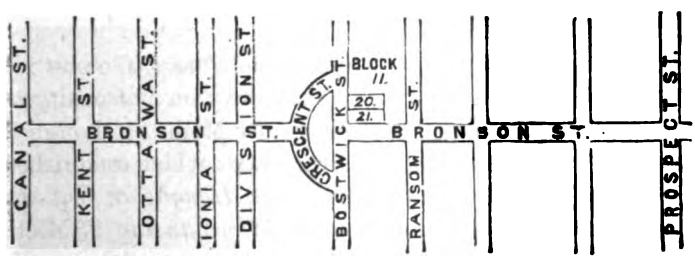
pay his tax under protest and sue in assumpsit to recover back the amount of the tax paid: *Detroit v. Martin* 34 Mich. 174; where an assessment is plainly illegal, and the tax void, there is no cloud caused thereby: *Curtis v. East Saginaw* 35 Mich. 508.

Cooley, J. This is a bill in equity to enjoin the collection of an assessment for the improvement of certain portions of streets in Grand Rapids, known as Bronson street, Crescent avenue and Bostwick street, under proceedings of the common council which are supposed to be void. The bill was demurred to and dismissed, and complainant appeals. The ground of invalidity chiefly relied upon is that Crescent avenue and parts of two streets were all to be improved in a single proceeding and by a single assessment; which, it is insisted, is unauthorized by law; but there are also various minor objections.

I. It appears by the map accompanying the bill of complaint that Bronson street extends from Canal street easterly, and is intersected by Kent, Division and Prospect streets, which cross it at right angles. About half way between Kent and Prospect streets is Bostwick street, which also intersects Bronson street at right angles. Before reaching Bostwick street, Bronson street, as it extends easterly across Kent and Division, branches or divides into two circular arms, which open out and extend into Bostwick, as shown by the accompanying diagram, so that the travel along Bronson



street must go around by one of these arms, and along Bostwick street to Bronson street again. These two circular

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arms of Bronson street constitute what is called Crescent street.

From the exhibits attached to the bill of complaint it appears that on February 2, 1880, the common council adopted a resolution "that the grading, graveling, and paving the gutters of Bronson street from the east side of Kent street to Prospect street, including the two circular arms of said Bronson street between Division street and Bostwick street and known as Crescent avenue in said city of Grand Rapids, including the construction of the necessary bridges, culverts, gutters, cross-walks, man-holes, catch-basins, approaches, and cesspools therein, is a necessary public improvement." This it will be perceived says nothing about the grading, etc., of Bostwick street, and treats Crescent avenue as a part of Bronson street.

On February 28, 1880, the council adopted another resolution, apparently to remedy a supposed defect in the one above given, and described therein the street or streets to be improved as "Bronson street from the east side of Kent street to Prospect street, including the two circular arms of said Bronson street between Division street and Bostwick street known as Crescent avenue in the city of Grand Rapids, and also the space between the east ends of said two circular arms to the center of that part of Bronson street east of Bostwick street and said Bronson street, thence east to Prospect street in said city of Grand Rapids."

On March 1, 1880, both the foregoing resolutions were rescinded, and a new resolution adopted of the same purport, but describing the street or streets to be improved as follows: "Those portions of Bronson street in the city of Grand Rapids included within the following limits, namely: from the east line of Kent street east to the west line of Crescent avenue, and from the west line of Bostwick street to the east line of North Prospect street in said city;" "also Crescent avenue" and "that portion of Bostwick street lying between the north line of the north portion of Crescent avenue produced easterly and the south line of the south portion of Crescent avenue produced easterly." It was

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under this last resolution that the work in question was done, and the objection to it is that three or more distinct improvements were provided for by a single resolution, whereas by law each should have been provided for and made by itself.

One cannot read the three resolutions above given without perceiving that the common council regarded the work they provided for as a single improvement. In the first resolution which apparently was intended to cover all that is embraced in the third, it was not thought necessary to mention Bostwick street at all, and Crescent avenue is treated as a part of Bronson street, as for all practical purposes it is. The second resolution was a little more particular, but the idea is the same, and it is only more fully expressed, apparently from abundant caution, in the third resolution. The "necessary public improvement" intended by each was the improvement of Bronson street from Kent street to Prospect street, including the passage ways around the space embraced by the two arms known as Crescent street. This space we might infer from the map is a little park or other public ground, but the record does not explain.

It was decided in *Arnold v. Cambridge*, 106 Mass. 352, that it was not competent for the city to order the building of sidewalks on two streets and provide for the expense by a single assessment levied upon the abutting owners. It was found in that case that the statute under which the assessment purported to be made contemplated that each street was to be considered and treated by itself; and that being the case, there was no authority for making a single assessment district and a single assessment for two sidewalks. But in order to make that decision applicable it must appear that there are in fact two improvements, and not a single work only, in what is substantially a single public highway. It sometimes happens that a single street has different names for different parts; but this fact could not preclude the whole being graded or paved under a single resolution and the cost provided for by a single assessment. The unity of the work must determine the right to deal with it as a whole, and not the diversity of names that may be given to its vari-

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ous parts. We should impute absurdity to the legislature if we were to conclude that they intended under any circumstances that a single improvement should be taken up and dealt with in divisions.

In one sense the improvement in this case was apparently single. It was the improvement of what was substantially a single avenue from one part of the city to another, but divided at one point into two, where its two branches passed around a small piece of ground. The people along the line from end to end must have had a common interest in its improvement; and it is quite possible if not probable that the improvement of that part of the street on which they happened to live would have been of little or no importance except in connection with the improvement of the remainder. We may well suppose the improvement of a part only of Bronson street at the expense of adjacent owners would be grossly unjust when the improvement of the whole together with the connecting arms at their expense would be strictly just as well as highly beneficial. We do not know what the fact was in this case; but the circumstance that a single party only is heard complaining is strongly indicative of the consent of the others.

If one assessment cannot be made to cover this case, then it would seem there must be four: one for each part of Bronson street, one for Bostwick street and one for Crescent avenue. But it seems highly probable that the four assessments would overlap each other, and that what are called Bostwick street and Crescent avenue ought to be improved in part at least by owners of property east and west of them on Bronson street. If this is so the purpose of the statute would be defeated instead of being advanced by the four assessments, and confusion would be created by the subdivision of that which the statute evidently meant should be considered as an entirety. No doubt the council may provide for the improvement of a part of a street at a time when only a part needs improving at that time or in the way provided; but to lay several assessments at the same time for improving different parts of the same street in the same way must often be highly inexpedient.

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In the case at bar the authorities have treated the improvement as a unit, and there is nothing in the record which conclusively shows that they erred. We must therefore assume that the conclusion was just. It is not disputed that they had ample power by statute to levy an assessment; and that being conceded, we cannot assume from any ambiguous facts that they erred in exercising the power. *Stockle v. Silsbee* 41 Mich. 615.

II. It is objected to the resolution declaring the necessity of the improvement that included therein were "the necessary bridges, culverts, gutters, cross-walks, man-holes, catch-basins and approaches therein and connected therewith," without specifying what were necessary, and that the effect was to delegate to those who should be entrusted with the duty of carrying out the resolution the discretion to decide upon the necessity. But the conclusion does not follow from the premises. The council declared in general terms the necessity of the work as a public improvement; but it did not undertake to settle upon the details; nor was it needful to do so in the action to be taken at that time. Details would be settled afterwards by the action of the council itself. Moreover, there is nothing in the record which shows that there were any bridges or culverts to be constructed, or anything else that was not properly incidental to the improvement of the streets; and if there were no bridges or culverts there could of course have been no delegation of power in respect to them.

III. The statute requires that an estimate of the expense of the proposed improvement shall be made by the board of public works and reported to the council before any assessment is made. The provision is as follows: "When the common council of said city decide that the construction of any public work in said city is a necessary improvement, the board of public works, with all convenient dispatch, shall determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work, and of the material to be used in detail, and cause to be prepared, so far as necessary, plans and

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specifications for such work, and report their estimate to the common council as a basis for assessing or otherwise raising, according to law, the funds necessary to enable the board to go forward and complete such work." Laws 1873, vol. 3, p. 57.

The bill states that, as appears by the minutes of the common council, at a regular session held April 12, 1880, the board of public works reported an estimate as follows:

"GRAND RAPIDS, MICHIGAN, April 10, 1880.

To the Hon. Board of Public Works: GENTLEMEN—I submit herewith the estimate of cost for the improvement of Bronson street and Crescent avenue, as follows:

Contract price, - - - - - - -	$14,500 00
Assessment, engineering, printing, etc., - -	450 00
Total, - - - - - - - -	$14,950 00

Respectfully submitted,

A. C. SEKELL, City Surveyor.

Estimate of cost. Improvement of Bronson street and Crescent avenue.

Approved by the board of public works, and ordered certified to the council.

April 10, 1880.

GEORGE W. THAYER, Pres't."

The bill does not negative the making or reporting of any further or other estimate.

Three objections are taken to this estimate:

1. That it is the estimate of the surveyor, and not of the board. But the board adopted, approved and reported it, and that was sufficient. It was very proper for the board to make use of the surveyor's services in preparing it.

2. That the estimate was made in gross, and not in detail. If the paper above given was all that was reported, this objection, as matter of fact, appears to be well taken. Whether in that case it is fatal is another question. The board of public works must undoubtedly make a detailed estimate, but there is much reason for contending that if only the sum total is reported to the council, and that body sees fit to act upon it, the objection cannot be taken afterwards. The estimate is for the information of the council, to enable that body to determine how much money shall be

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raised; and if they have the sum total and act upon it without calling for further particulars, it may well be urged that the question is precluded. But we do not decide that point in this case, because the bill does not negative the submission of detailed information.. It is perfectly consistent with the bill and with this paper that details may have been submitted by the board with the summary which they handed in, or that there may have been a further report besides the one given. Indeed some of the subsequent proceedings would indicate this; for while the paper given names Bronson street and Crescent avenue only, in a subsequent resolution of the council an estimate is referred to as covering the whole improvement proposed to be made, The omission in the foregoing paper of all reference to Bostwick street may have been accidental, but in support of a bill in equity to restrain the collection of taxes we can make no presumption against the correctness of official action.

3. It is objected that the estimate includes the cost of engineering and printing. But these were legitimate expenses, incidental and necessary to the assessment, and were properly included. *Beniteau v. Detroit* 41 Mich. 116.

IV. Several objections are taken to the resolution of the common council establishing an assessment district, but they are very technical, and require no special attention. The assessment is objected to on more plausible grounds. The resolution of the council directing an assessment contained the following clause: "And that the board of review and equalization of the city of Grand Rapids, who by the charter of said city are constituted commissioners for that purpose, be and they are hereby directed to make said assessment upon all the owners or occupants of lands and houses within the district aforesaid, in proportion, as nearly as may be, to the advantage which shall be deemed to accrue by the making of such improvement, and that the said commissioners meet for the purpose of making said assessment on Tuesday, the 27th day of April, 1880, at ten o'clock in the forenoon, at the office of the city clerk." The report made in pursuance of this resolution was made by two of the members of

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the board, who make and subscribe it as "a majority of the board of review and equalization of the city of Grand Rapids, and the commissioners named in the annexed order and subscribing the annexed assessment roll." There is no doubt a majority of the board had the right to act, and that their action is legal if all were notified of the meeting. Comp. L, § 2. The bill relies upon the fact that the report on its face purports to be that of a majority only; but as this may be correct it is manifest that no illegality is shown by the mere fact that one of the board does not unite in the action.

V. It is further objected that the contract which was let was a contract "to improve Bronson street and Crescent avenue" only; and it is true as set out in the bill the contract does not mention Bostwick street. But the contract refers to accompanying plan, specifications and profile, and makes them a part of itself; and these are not given. With them the contract was probably complete; but if not, we do not know the fact.

Other objections are taken, but we find none that is substantial. The decree of the court of chancery dismissed the bill, and it must be affirmed with costs.

The other Justices concurred.

JOHN H. DE MAY AND ALFRED B. SCATTERGOOD v. ALVIRA ROBERTS.

Intrusion upon case of confinement.

Where a physician takes an unprofessional unmarried man with him to attend a case of confinement, and no real necessity exists for the latter's assistance, both are liable in damages; and it makes no difference that the patient or husband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence.

Damages may lie for an injury done, when its full extent is discovered, though long after the act from which it springs.

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A physician took an unprofessional friend with him him to attend a case of confinement when there was no emergency requiring the latter's presence. The physician told the patient's husband that he had brought a friend with him to help him carry his things, and he was accordingly admitted. The patient, on afterwards discovering the facts, sued both in damages. *Held*, that the plaintiff and her husband had a right to presume that the outsider was a medical associate; that in obtaining admission without disclosing his true character, the defendants were guilty of deceit; that plaintiff had a right to testify that she had supposed he was a physician or medical student, and also to give evidence of whatever may have been said at the time tending to support such supposition. It was also admissible to ask a competent witness as to the custom among physicians in regard to calling assistance in these cases.

A witness cannot be asked what he stated in an affidavit, but the affidavit itself must be produced.

Error to Gratiot. Submitted April 12. Decided June 8.

CASE. Defendants bring error. Affirmed.

H. & H. E. Walbridge for plaintiffs in error.

J. H. Kimball and *J. K. Wright* for defendant in error.

MARSTON, C. J. The declaration in this case in the first count sets forth that the plaintiff was, at a time and place named, a poor married woman, and being confined in childbed and a stranger, employed in a professional capacity defendant De May who was a physician; that defendant visited the plaintiff as such, and against her desire and intending to deceive her wrongfully, etc., introduced and caused to be present at the house and lying-in room of the plaintiff and while she was in the pains of parturition the defendant Scattergood, who intruded upon the privacy of the plaintiff, indecently, wrongfully and unlawfully laid hands upon and assaulted her, the said Scattergood, which was well known to defendant De May, being a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine, while the plaintiff believed that he was an assistant physician, a competent and proper person to be present and to aid her in her extremity.

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The second and third counts while differing in form set forth a similar cause of action.

The evidence on the part of the plaintiff tended to prove the allegations of the declaration. On the part of the defendants evidence was given tending to prove that Scattergood very reluctantly accompanied Dr. De May at the urgent request of the latter; that the night was a dark and stormy one, the roads over which they had to travel in getting to the house of the plaintiff were so bad that a horse could not be ridden or driven over them; that the doctor was sick and very much fatigued from overwork, and therefore asked the defendant Scattergood to accompany and assist him in carrying a lantern, umbrella and certain articles deemed necessary upon such occasions; that upon arriving at the house of the plaintiff the doctor knocked, and when the door was opened by the husband of the plaintiff, De May said to him, "that I had fetched a friend along to help carry my things;" he, plaintiff's husband, said "all right," and seemed to be perfectly satisfied. They were bidden to enter, treated kindly and no objection whatever made to the presence of defendant Scattergood. That while there Scattergood, at Dr. De May's request, took hold of plaintiff's hand and held her during a paroxysm of pain, and that both of the defendants in all respects throughout acted in a proper and becoming manner actuated by a sense of duty and kindness.

Some preliminary questions were raised during the progress of the trial which may first be considered.

The plaintiff when examined as a witness was asked, what idea she entertained in reference to Scattergood's character and right to be in the house during the time he was there, and answered that she thought he was a student or a physician. To this there could be no good legal objection. It was not only important to know the character in which Scattergood went there, but to learn what knowledge the plaintiff had upon that subject. It was not claimed that the plaintiff or her husband, who were strangers in that vicinity, had ever met Scattergood before this time or had any knowledge or information concerning him beyond what they obtained on that evening, and it was claimed by the

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defendant that both the plaintiff and her husband must have known, from certain ambiguous expressions used, that he was not a physician.

We are of opinion that the plaintiff and her husband had a right to presume that a practicing physician would not, upon an occasion of that character, take with him and introduce into the house, a young man in no way, either by education or otherwise, connected with the medical profession; and that something more clear and certain as to his non-professional character would be required to put the plaintiff and her husband upon their guard, or remove such presumption, than the remark made by De May that he had brought a friend along to help carry his things. The plaintiff was not bound however to rest her case upon this presumption, however strong it might be considered, but had a right to prove what she supposed was the fact, and this she could do by showing anything said at the time having such a tendency, or in the absence thereof what she actually believed to be the fact.

The question asked the plaintiff's husband as to what he had stated under oath in an affidavit was properly overruled. This court has repeatedly pointed out the proper practice in such cases. *Hamilton v. The People* 29 Mich. 198, and cases cited.

The question asked the witness Dr. Monfort* as to the custom among physicians in such cases as to calling assistance was not objectionable; besides, the answer given could in no way have injured the defendants. In either event therefore they cannot complain.

It yet remains to consider the principal questions raised in the case. They relate to the sufficiency of the declaration, to which the general issue was pleaded, and farther that

*The testimony of Dr. Monfort was as follows: *Question.* "You say you have been in practice about eight years; what is the custom among physicians called upon to do the necessary duties attending cases of midwifery in reference to calling in assistance? *Answer.* I suppose that would depend somewhat upon the circumstances under which the case existed; usually it is not the custom to have assistance, unless the case demands it; after it is ascertained that assistance is required, it is customary and proper to call medical assistance; in an urgent case, perhaps most any kind of assistance; but medical if it could be obtained."

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admitting the facts to be true as claimed by the plaintiff she was not entitled to recover. We need not consider the question as to what the effect would be had the jury found that the plaintiff knew the non-professional character of the defendant Scattergood and made no objection or consented to his remaining in the house or rendering such assistance as was demanded. Upon this branch of the case the court charged the defendants would be justified in doing what they did, if the plaintiff or her husband consented to Scattergood being there, with a full understanding of, or with good reason to believe or know of the character in which he was there. This certainly was placing the matter in a sufficiently favorable position for the defendants.

A few facts which were undisputed may assist in more clearly presenting the remaining question. Upon the morning of January 3d Dr. De May was called to visit the plaintiff professionally which he did at her house. This house was fourteen by sixteen feet. A partition ran partly across one end thus forming a place for a bed or bedroom, but there was no door to this bedroom. Next to this so-called bedroom, and between the partition and side of the house, there was what is known and designated as a bed sink; here there was a bed with a curtain in front of it, and it was in this bed the doctor found Mrs. Roberts when he made his first visit. On their way to the house that night De May told Scattergood, who knew that the plaintiff was about to be confined, "how the house was; that she was in the bed sink back, and there was a curtain in front of her, and told him he need not see her at all." When the defendants got to the house they found Mrs. Roberts "had moved from the bed sink and was lying on the lounge near the stove."

I now quote farther from the testimony of Dr. De May as to what took place:

"I made an examination of Mrs. Roberts and found no symptoms of labor at all, any more than there was the previous morning. I told them that I had been up several nights and was tired and would like to lie down awhile; previous to this, however, some one spoke about supper, and supper was got and Scattergood and myself

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eat supper, and then went to bed. I took off my pants and had them hung up by the stove to dry; Scattergood also laid down with his clothes on. We lay there an hour or more, and Scattergood shook me and informed me that they had called and wanted me. Scattergood got my pants and then went and sat down by the stove and placed his feet on a pile of wood that lay beside the stove, with his face towards the wall of the house and his back partially toward the couch on which Mrs. Roberts was lying. I made an examination and found that the lady was having labor pains. Her husband stood at her head to assist her; Mrs. Parks upon one side, and I went to the foot of the couch. During her pains Mrs. Roberts had kicked Mrs. Parks in the pit of the stomach, and Mrs. Parks got up and went out doors, and while away and about the time she was coming in, Mrs. Roberts was subjected to another labor pain and commenced rocking herself and throwing her arms, and I said "catch her," to Scattergood, and he jumped right up and came over to her and caught her by the hand and staid there a short time, and then Mrs. Parks came up and took her place again, and Scattergood got up and went and took his place again, back by the stove. In a short time the child was born. Scattergood took no notice of her while sitting by the stove. The child was properly cared for; Mrs. Roberts was properly cared for, dressed and carried and placed in bed. I left some medicine to be given her in case she should suffer from pains."

Dr. De May therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from

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its violation. The fact that at the time, she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants.

Where a wrong has been done another, the law gives a remedy, and although the full extent and character of the injury done may not be ascertained or known until long after, yet in an action brought damages therefor may be fully awarded. This is true both in cases of tort and crime as well as in actions for breach of contract. The charge of the court upon the duty and liability of the defendants and the rights of the plaintiff was full and clear, and meets with our full approval.

It follows therefore that the judgment must be affirmed with costs.

The other Justices concurred.

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STEPHEN W. DUNCOMBE, ADM'R v. JAMES S. RICHARDS ET UX.

Death-bed assignments—Fair dealing—Gifts—Acknowledgments.

Successive transfers of property consisting of mortgages were procured by a nephew from his uncle within a few days before the latter's death and while he was in an enfeebled condition. The uncle was 82 years old, had made his home with his nephew and was said to be estranged from his other near relations. He was a temperate and thrifty bachelor who had little society. The nephew was neither temperate nor thrifty. *Held* that as the assignments were made on the donor's death-bed, and in the absence of all near relations except the beneficiary, they were open to suspicion, and on a bill to set them aside the beneficiary had the burden of showing their fairness.

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Where one who has the burden of showing fair dealing is evasive in his testimony he increases the burden and it is no excuse that he was afraid of being entrapped by counsel.

The question in determining whether a gift has been made is not what the donor had contemplated or intended, but whether his intentions were carried into effect; and to accomplish this an intelligent will directing or assenting to the act done, is essential.

On a bill to set aside transfers of mortgages made on the grantor's deathbed and claimed by the transferee to have been made as a gift, testimony that the donor, though shown to be a prudent and sensible man, had confidentially disclosed to inferiors and strangers what he intended to do with his property, can give little support to a suspicious case; nor can testimony that he had once handed over to the transferee a box of mortgages, saying "I give you all my personal property,"—there being no reason to suppose that he afterwards considered himself divested of the property or that the supposed donee considered himself owner; nor can testimony that after the transfers were made the donor was heard to say that the donee should have his property when he was done with it.

Where an acknowledging officer, when summoned to attest the transfer of property procured by the transferee under suspicious circumstances, neglects to carefully investigate the condition of things in the beneficiary's absence, his testimony that the donor seemed to be in full possession of his faculties is less satisfactory than if he had taken such precautions.

Appeal from Van Buren. Submitted April 13–14. Decided June 8.

BILL to set aside assignments of mortgages. Defendant appeals. Affirmed.

B. F. Heckert, *Spafford Tryon* and *Joslyn & Freeman* for complainant. Contracts, gifts and beneficial transfers to a confidential agent are open to suspicion: *Comstock v. Comstock* 57 Barb. 469; *Delafield v. Parish* 25 N. Y. 9; *Sears v. Shafer* 1 Barb. 409: 6 N. Y. 272; *Whelan v. Whelan* 3 Cow. 537; *Eadie v. Slimmon* 26 N. Y. 9; *Rollwagen v. Rollwagen* 63 N. Y. 508; Story's Eq. Jur. §§ 176, 178; and the grantee has the burden of showing good faith: *Todd v. Grove* 33 Md. 188; *Boyd v. De La Montagnie* 73 N. Y. 502; *Hoghton v. Hoghton* 15 Beav. 278; *Lake v. Ranney* 33 Barb. 69; *Forman v. Smith* 7 Lans. 450; *Bergen v. Udall* 31 Barb. 24.

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F. J. Atwell and *C. I. Walker* for defendant.

COOLEY, J. At the beginning of the year 1878 Hezekiah Selleck, a man 82 years of age, was living in the family of James S. Richards the defendant, in Van Buren county in this State. Mr. Selleck was a man of some education, was prudent even to excess in his expenditures, strictly temperate, and had accumulated a very considerable property. He had never married; a fact which is attributed by some witnesses to a disappointment in his mature manhood, and which probably tended to make him somewhat shy, and to prefer the retirement of a plain country life which he found with defendant. Defendant was his nephew; was not abstemious as his uncle was; had not been a money-making man, and what he possessed was largely due to his uncle's assistance and gifts. Mr. Selleck had a brother and nephew living in Vermont, and two nieces, one of whom was a sister of defendant, and had been at one time housekeeper for her uncle before he went to live with defendant. There is evidence tending to show that Mr. Selleck was estranged from this last-mentioned niece; and those who attempt to account for the fact attribute it to her being married against his will, though her husband, so far as appears, is a person to whom no good objection could be urged. There is also evidence that he expressed feeling against his brother, by whom he said he had lost money; not a large amount, however, and less than he had lost by defendant. Whether or not he was really estranged from his other relatives as is supposed, it is quite sure that at the time mentioned he was living on confidential relations with the defendant, having very little society, and no society at all of his other relatives except occasional visits from defendant's sister. Nothing in the evidence indicates that his mind was not clear, or that it was enfeebled otherwise than by the inevitable infirmities that come with great age.

About this time, however, he became seriously ill with inflammation of the stomach, and early in March was considered in a dangerous condition. On the 18th of that month

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the attending physician pronounced his case hopeless, and said he was dying of the poison of uric acid. He nevertheless revived after that day, and lived until the 15th day of the next month. The series of events which have given occasion for this suit took place in the month in which he died. On the third day of that month defendant procured from Mr. Selleck an assignment of a mortgage given by one Koshway to secure the payment of $240. On the eighth he obtained an assignment of a mortgage given by one Hedges for $4800. On the tenth a mortgage for $1275 given by one Daniel Brosnahan was assigned to him, and also another for $2478.55 given by Thomas, Michael and Timothy Brosnahan. On the same day the three Brosnahans gave to defendant a purchase-money mortgage for $6000 on land conveyed to them by Selleck. On the day Selleck died defendant obtained from him two assignments; one of a mortgage for $430 given by one Downey, and another of a mortgage for $2670.32 given by one O'Keefe. These mortgages constituted nearly all of Mr. Selleck's property so far as it was within the knowledge or observation of his acquaintances, and left belonging to him at his death insufficient means for the payment of his debts.

These assignments being made by Mr. Selleck while on his death-bed, in the absence of all his near relatives except the beneficiary himself, were naturally the subject of grave suspicion, and the circumstances justly, as we think, imposed upon the defendant the burden of making some showing of their fairness. *Dent v. Bennett* 4 My. & Cr. 269; *Billage v. Southee* 9 Hare 534; *Tate v. Williamson* L. R. 2 Ch. App. 56; *Turner v. Collins* L. R. 7 Ch. App. 329; *Ashwell v. Lomi* L. R. 2 P. & D. 477; *Seeley v. Price* 14 Mich. 541; *Wartemberg v. Spiegel* 31 Mich. 400; *Jacox v. Jacox* 40 Mich. 473; *Ferguson v. Lowery* 54 Ala. 510; *Highberger v. Stiffler* 21 Md. 338; *Pierce v. Pierce* 71 N. Y. 154; *Cowee v. Cornell* 75 N. Y. 91; *Cadwallader v. West* 48 Mo. 483. This he soon had an opportunity of making in the probate court. Mr. Duncombe was appointed administrator on Mr. Selleck's estate, and caused the defendant to be sum-

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moned into court to answer to a charge of secreting assets.

It is not now pretended that defendant could stand for a moment on the testimony he then gave. It is evasive and contradictory, and it makes a pretence of having purchased the mortgages, or taken them as security, which is now wholly abandoned. His course on this examination is now excused on the suggestion that he was afraid of being entrapped by counsel, and sought to protect himself by evasions. If the excuse is well founded it is plain that defendant by his baseless pretences under oath increased the burden already resting upon him of making a showing of fair dealing by other evidence.

The administrator filed his bill in equity to reclaim all these mortgages for the estate, charging that they were obtained from the intestate when he was incapable of intelligently transacting business, and by means of fraud and undue influence. The defendant answered, claiming the mortgages as gifts, made by the intestate when he was perfectly capable of understanding what he was about, and in pursuance of a long-cherished design.

Of the long-cherished design there is some evidence. Some of it, however, looks like an arrangement of appearances for some other purpose than a transfer of property. Of this character is the evidence of defendant's wife that in the winter of 1875–6 Mr. Selleck one morning after finishing breakfast got up from the table, went to a tin box in which he kept his notes and mortgages, took the box and handed it to her husband, saying "Here, James, I give you all my personal property." There is a suggestion which some other facts render plausible, that this was done to enable Mr. Selleck to evade taxation on his securities; but however this may be, there is no reason to think that from this time on Mr. Selleck considered himself divested of all personal estate or that defendant supposed he was owner. Some of the evidence is also extremely improbable, and if true shows him to have had a weakness of mind quite inconsistent with the major part of defendant's testimony. Thus, one woman with whom he had had no intimacy whatever,

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and who never saw him but four times, testified to having asked him on the second or third occasion what he was going to do with his property, and according to her statement instead of rebuking the impertinent interference, he confidingly intrusted to her all his intentions. A hired man testifies to similar confidences, one of which was while Mr. Selleck was on his death-bed. He is then said to have told defendant's wife in presence of the witness, that her husband should have his property when he was done with it, though this, as near as we can gather from the uncertain and confused testimony, must have been after Mr. Selleck had already passed over nearly everything. Such evidence can give little support to a doubtful or suspicious case.

The vital question, however, is not what the intestate had contemplated or intended, but whether his intentions were carried into effect. To accomplish this an intelligent will directing or assenting to the act done was essential. To show such a will the magistrate who drew and took the acknowledgment of the papers was sworn. His evidence shows clearly that defendant was the principal actor in procuring the assignments to be made, but it also shows that the magistrate believed the intestate knew at the time what he was doing. But if the magistrate suspected no wrong—and apparently this was the fact—he might easily have supposed he saw evidences of intelligence which were only apparent, not real. It is surprising that it did not occur to him as strange that he was being sent for from day to day to make successive transfers of property for a dying man, and that he was not led by the circumstances to make careful investigation into the real state of the case when defendant was not present. This precaution, however, was wholly neglected, and the magistrate's testimony is for that reason not as satisfactory as it would otherwise have been. That he took things for granted is evident from the written memorandum which he afterwards made of the facts, in which he says that the testator "apparently had been reading, as a newspaper lay on the bed beside him." On the whole we can only say of the evidence it tends to show that Selleck

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knew what he was doing when the assignments were made, but there is quite as much that opposes the proposition as that favors it; and there is evidence, even in the testimony of defendant's witnesses which raises serious doubts of Mr. Selleck having been a conscious actor on some occasions. This may be said of Mrs. Keith's evidence of what she observed on the third of April, on which occasion she was told by defendant's wife that they wanted nobody to disturb Mr. Selleck at all, because they wanted to save his strength so that he could sign some papers. And the case is not without circumstances which suggest that actual deception was practiced when the old man was too feeble to detect it.

The suspicious character of the transaction is not relieved by any facts occurring afterwards. Defendant did not inform the Vermont relatives of his uncle's death, and was angry when he found, a month or so afterwards, that his sister had written to them. It is possible he speaks the truth when he says Mr. Selleck did not want him to let them know, because of the feeling he had against his brother; but as Mr. Selleck is shown by the defence to have been a devout Christian, and his last days are represented as having been passed in Scripture reading and contemplation, this statement cannot be readily accepted, and if actually made is no excuse for defendant's neglect.

But it is not important to enter now upon any analysis of the evidence, or any full presentation of the reasons which bring us to the conclusion that the defendant has not made out his defence. The record is exceedingly voluminous, and the evidence has been very carefully sifted and ably presented on both sides, and our unhesitating conclusion is that the decree of the chancery court is substantially correct. In some unimportant particulars it have been differently expressed, but in all essentials it is right as it stands. It will therefore be affirmed with costs.

MARSTON, C. J. and GRAVES J. concurred.

CAMPBELL, J. I concur, chiefly on the ground that defendant in the probate court gave a different statement from that relied on in this case, and which was palpably false.

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DANIEL E. HARRISON v. FITCH DEWEY ET AL.

Accounting—Record—transcripts from books—Voluntary Compromise.

Transcripts from partnership books and not the books themselves should be returned to the Supreme Court on an appeal from a decree on an accounting, unless there is something in the appearance of the books which is necessary to consider on questions of fraud or forgery, or some special difficulty. Otherwise parties ought not to be deprived of the custody of their books.

Where a partner had turned over to the firm certain securities to be used in paying for property purchased by them, and the firm credited him with them and guaranteed them to the party to whom they were given, and when a deficiency afterwards arose the partner who had been credited took back the title to a part of the mortgaged premises, it was to that extent proper to charge back the securities to him.

A fair compromise deliberately made by partners in settling their accounts ought not to be disturbed on a bill for an accounting, if the parties had had full opportunity to inform themselves and complainant does not show that there were false charges or omissions of specific credits.

Appeal from Ingham. Submitted April 15. Decided June 8.

BILL for accounting. Defendants appeal. Affirmed.

M. V. & R. A. Montgomery for complainant.

Millard & Bean for defendants.

CAMPBELL, J. Harrison filed his bill to get relief, as a retired partner, concerning his claims against the firm assets. From 1872 to 1877 he was a partner in a business in which there were some changes of ownership. In July, 1877, the firm consisted of Harrison, Dewey, Lane, Charles Palmer, and Foster R. Warren. The capital stock was $22,500, and the actual assets as inventoried were about $88,000, subject to not far from $16,000 debts. Assuming them to be worth their face, the assets beyond debts and capital would reach nearly $50,000, leaving each partner nearly $10,000.

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In July, 1877, the defendants desired to form a new concern, and bought out Warren for the sum of $12,500, he accepting as his share beyond his capital stock $7500 as his interest in the profits. Harrison was also applied to, to sell out, and upon all the testimony we have no doubt that was the purpose of the arrangement which is set up in the bill, although he claims his sale was partial. Dewey insisted at this time that Harrison had overdrawn his accounts sufficiently to use up all his profits. Harrison claimed on the other hand that there was a very large balance in his favor. After an offer of $1000 had been refused, he finally accepted $2500. This he claims to have done under false representations from Dewey as to the state of the accounts and assets; and this bill is filed, practically for the purpose of rescinding that arrangement and obtaining an account of his proper share.

We have found much inconvenience resulting from the manner in which the testimony was put in. Instead of transcripts from such parts of the books as became material, the books were put in bodily, and no statement whatever was laid before us of Harrison's account, in the way in which it appeared on the books. It is not desirable or proper in ordinary cases to have the books themselves introduced and filed, unless there is something in their appearance which it is necessary to consider on questions of fraud or forgery, or some special difficulty. But where no such issue is raised, parties ought not to be deprived of the custody of their own books, and such accounts as are required should be transcribed.

In the present case the only issues presented by the pleadings or on the argument, which involved the correctness of the books, related to particular charges. It was not claimed the books themselves had been wrongly kept, or manipulated.

The chief item of dispute was a set of charges against Harrison for deficiencies in the proceeds of some securities which he turned over to his firm to be used in payment for some property purchased of Mr. Johnston. These securities amounted to $11,300 as credited. They were guaranteed to

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Johnston by the members of the firm; and when the deficiency arose they were charged back, so far as necessary, to Harrison.

The testimony is not as clear as it should be on these items. It is admitted that Harrison, when the difficulty arose, took back the title to one portion of the mortgaged premises, and we think it very clear that as to this the charge back was right. The exact amount of the other deficiency is not shown, but it seems to have been not far from $2000.

No other charges claimed to be wrong have been brought to our attention.

Allowing the full amount of these Johnston charges to stand, the books show that in July, 1877, at the time of settlement, Harrison was indebted to the firm in excess of all his credits, in the sum of about $9639.71. That is the balance shown, and subject possibly to some miscalculations, is correct or nearly so. Dewey's statements, therefore, as to the condition of the books were not seriously erroneous. The additional $2500 which was paid to Harrison made the share which he drew of the profits more than $12000, and in excess of his proper share on the basis of the inventory, more than $2000, and more than $4500 beyond what Warren about the same time received for his equivalent share.

No items or specifications have been pointed out to us to indicate that there is any error in these figures. If they are correct he has on his own theory sustained no wrong, while on defendant's theory he has been largely overpaid.

We have referred to these figures chiefly for the purpose of showing that if there was a fair compromise, it ought not to be disturbed. It appears from Harrison's own showing that he knew the Johnston deficiencies had been charged against him some time before the settlement. He knew that Dewey, who acted for the others, claimed that there was nothing coming to him. On this dispute there was one offer made and rejected, and then a larger offer of a round sum of $2500 accepted. We see no reason to believe Harrison could not have informed himself fully at the time. Since this suit was commenced he has had access to the

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books, and has pointed out no false charges, and no definite omissions of specific credits. We cannot assume that any exist; and we cannot properly speculate on peculiarities in the books which Harrison does not criticise or seek to have explained.

Whether the settlement was a better one or a worse one than Harrison was entitled to ask can make no difference if it was deliberately made. We think it was so made, and should stand.

The decree must be affirmed with costs.

The other Justices concurred.

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MICHIGAN CENTRAL R. R. Co. v. MARY L. GILBERT, ADM'X

Railroad companies—Master and servant—Negligence.

In an action against a railway company for the death of an engineer in consequence of a collision resulting from the yard-master's negligence in sending him out when a coming train was past due, it was *held* that as bearing upon the competency of the yard-master, questions as to the number of tracks in the depot yard,—the number of engines ordinarily employed in switching,—the average number of freight trains in the yard, and similar questions, were relevant as tending to show the character and importance of the work the yardmaster had charge of, and the need of experience and skill.

The nature of the business determines whether the degree of care exercised by those employed in it is such as the law requires.

The negligence of a servant in a particular instance cannot well be shown by testimony of his incompetency or carelessness on other occasions; but if it is also shown that the master knew of the cases or that they were of such a character and so frequent that he must have known of them, he, the master, may be chargeable with negligence in retaining such servant.

Where an employer has shown due care in the choice of his servants, no presumption of the latter's unfitness arises afterwards; but if it appears that a servant has been repeatedly guilty of carelessness or incompetency it is for the jury to determine whether the master knew of it or would have known if he had exercised ordinary care.

Evidence that a railroad employee is hasty, passionate and excitable does not of itself necessarily show that he is unfit for the post of yard-

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master; nor does the mere fact that he has sent an engine upon the track when a coming train was overdue conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time.

A locomotive engineer's opinion that if he had obeyed the order of the yard-master to place his engine on the main track when a coming train was past due, he would have gotten into trouble, was *held* inadmissible to show that the railroad company was negligent in keeping the yard-master in its employment, unless the case had been brought to the knowledge of the company officers.

Where the officers of a railroad company have had their attention directed to the intemperate habits of an employee, it is their duty to make careful and frequent investigation as to the fact if they retain him in their service. The weight and importance of evidence that they knew of it, is for the jury to pass upon.

Error to Jackson. Submitted April 26–27. Decided June 8.

CASE. Defendant brings error. Reversed.

Henry Russel and *G. V. N. Lothrop* for plaintiff in error. Personal negligence of the master is the gist of an action against him for an injury caused by an employee: *Wright v. N. Y. C. R. R.* 25 N. Y. 566; all that can be required of the master is that he shall choose his servants prudently and shall not retain them after finding them negligent and unfit: *Quincy Mining Co. v. Kitts* 42 Mich. 34; evidence of specific acts of negligence unknown to the master are therefore inadmissible: *Davis v. Det. & Mil. R. R.* 20 Mich. 105; *Mich. Cent. R. R. v. Dolan* 32 Mich. 510; *Priestley v. Fowler* 3 M. & W. 1; *Wilson v. Merry* L. R. 1 Scotch & Div. App. 326; *Keegan v. Western R. R.* 4 Seld. 175; *McMillan v. Sar. & W. R. R.* 20 Barb. 449; *Warner v. Erie Rw.* 39 N. Y. 468; *Ryan v. Fowler* 24 N. Y. 410; *Laning v. N. Y. Cent. R. R.* 49 N. Y. 521; *Chapman v. Erie Rw.* 55 N. Y. 579; *Collins v. Dorchester* 6 Cush. 396; *Robinson v. Fitchburg & W. R. R.* 7 Gray 92; *P. F. W. R. R. v. Ruby* 38 Ind. 294: 10 Amer. 111; *Frazier v. Penn. R. R.* 38 Penn. St. 104; *Det. & Mil. R. R. v. Van Steinburg* 17 Mich. 111; *Grand Rapids & Indiana R. R. v. Huntley* 38 Mich. 540.

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Edwin F. Conely and *Conely & Lucking* for defendant in error. A master is bound to use reasonable care in ascertaining the qualities of his servants, and to discharge those who are incompetent as soon as knowledge of their incompetency ought to reach him by the use of due diligence: Wood on Master and Servant §§ 416, 417, 420; proof of specific acts of the servant's carelessness is inadmissible, as evidence of his general reputation, to show the master's knowledge of his capacity: *Baulec v. N. Y. & H. R. R. Co.* 59 N. Y. 361.

MARSTON, C. J. On October 10, 1879, a collision occurred on the railroad company's road at Jackson junction, caused by the negligence of the company's yard-master in sending a switch-engine and train of cars upon the main track when the Pacific express train was past due, by which the engineer, Milton Gilbert, in charge thereof, without negligence on his part, and while in the performance of his duty, was killed.

Three principal questions are raised in this court, all relating to the sufficiency of the evidence introduced to establish the several propositions upon which alone the plaintiff would be entitled to recover, and these may be stated in the language adopted by counsel for plaintiff in error in the brief submitted, as follows:

1. That the sending out of the switch-engine upon the main track, whereby the collision occurred, was an act of negligence directly attributable to Evander T. Colwell, a co-employee with Gilbert, who was yard-master at the Jackson junction yard.
2. That Colwell was an unfit and incompetent person to perform the duties of yard-master.
3. That the railroad company knew, or might have known in the exercise of reasonable diligence, that Colwell was an unfit and incompetent person for that position.

The first proposition is not disputed, but the sufficiency of the evidence to establish either of the others is, and questions are also raised as to the competency of some of plaintiff's evidence to establish either.

The questions asked witnesses as to the number of tracks in the yard at the junction; the number of engines ordi-

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narily employed in switching; the number of freight trains there on an average, and questions of similar import, were in my opinion relevant and proper, as tending to show the character and importance of the work Colwell was placed in charge of, and that from its extent, the character of the employment and the dangers incident to it, a man of corresponding ability and experience should be found in charge of it placed there by the company.

While we may say as a general proposition that the degree of care required in all cases is that which men of ordinary care and prudence exercise, yet it is to the business itself that we must look when we desire to ascertain whether such care and prudence have or not been exercised in a given case. Ordinary care and prudence, or what might clearly be considered such, in a given case, might if applied in like manner, where the hazard and responsibility was greater, fall far short or be grossly negligent. A man might be fully qualified to act as yard-master at a small unimportant station, who would be wholly unfitted to take charge of a large yard with many tracks and where a large number of trains were arriving and departing each day.

The plaintiff introduced testimony as to special instances of alleged incompetency or carelessness on Colwell's part, and this also is complained of. It was not claimed in support of such testimony, and certainly it could not well be, that it had any tendency to prove that he was negligent in fact on the night of the collision. It was however incumbent on the part of the plaintiff to show, that the company was guilty of negligence in first employing Colwell because unfitted for the position, or in afterwards retaining him. This they could do by showing specific acts of incompetency, and bringing them home to the knowledge of the company, or by showing them to be of that nature, character and frequency, that the company, in the exercise of due care on its part, must have brought them to its notice.

While it is true that when a company has exercised due care and prudence in the choice of its servants, and that where this has been done no presumption of unfitness

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afterward arises, yet the master cannot shut his eyes, close his ears, and rest in peaceful security, unconscious and indifferent to what may thereafter take place. A vigilance corresponding in degree to the dangers attending or likely to attend careless management, ever remains on the part of the master, and when the plaintiff has shown repeated instances of carelessness or incompetency of a certain character on the part of the servant, it remains for the jury to determine whether they did come to the knowledge of the master, or would have, had ordinary care been exercised on his part. Any other rule would absolve the master from all danger, if he but exercised due caution in the first place, unless actual knowledge was afterwards brought home to him, which in many cases it would be most difficult to prove. *Davis v. Detroit etc. R. R. Co.* 20 Mich. 124; Cooley on Torts, 559 and cases cited.

Were the specific instances enquired about in the present case of that nature as to bring them within the rule that would by implication bring them home to the knowledge of the railroad company?

The following are some of the questions asked and answered:

Q. "What was the character of Colwell in reference to being a man of hasty and reckless action; what was his general conduct in that respect?"

A. "Colwell was a very hasty man and a very passionate man at all times; it took but little to excite him."

The witness who gave this testimony was Joseph H. Sawyer, who had been a switchman, a brakeman and helper at this yard, and who testified to a previous occasion when Colwell took the risk of running a switch train on the main track when a train was due, but no accident then happened, nor was the fact reported. This witness was afterwards asked:

Q. "Now, I will ask you if, in the course of time that you were there with Colwell, there were other occasions upon which you refused to have your switch engine go out upon the main track after the time the train was due?"

A. "Yes, I had refused him, I should think, two or three times, when we went out and escaped the Pacific."

Q. "Do you know whether if you had obeyed his orders and gone out, any accident would have happened?"

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A. "That would owe to the condition of the track; it would owe to whether he had any cars to his engine or not; I did refuse one night; I know if I had gone out with my cars I do not doubt but what we would have gotten into trouble."

It seems very difficult to me to say that the first question and answer in any way tend to show Colwell's unfitness for the position. He may have been a most prudent and careful man, and his passion and excitement aroused from seeing others' acts of rashness and his desire to promptly prevent accidents resulting therefrom. The answer to the second question and the facts called for therein, relate but to the fact that Colwell had desired to send a switch engine on the main track after the time a train was due. I do not understand from anything in the record in this case, that the fact of a coming train being past due, in and of itself would conclusively prevent any such use of the main track. The evidence shows that all trains were run by telegraph, and the time they passed each station reported, so that the position of the coming train and the time of its arrival could be known by the yard-master, and that the rules of the company prevented any use of the main track for a certain length of time before its expected arrival.

A train may be past due according to the schedule time as understood by the switchman, and yet it may be well known to the yard-master and officers of the company that by reason of accident or otherwise, it cannot arrive for perhaps hours, and surely in such a case, the mere fact of past due, should not prevent a use of the track. That fact alone does not necessarily imply negligence.

The answer to the third question was mere matter of opinion, in a certain sense purely speculative, and from the very nature of all such evidence it could only be known, if not reported, by the immediate actors therein. It was not a matter that could have been known generally, as would the fact of an accident; it would not call for or lead to any inquiry, and was known but to these two persons, so that no matter how active and diligent the officers of the railroad company may have been, unless they inquired of Mr. Saw-

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yer they would have heard nothing even to put them upon inquiry. I am very clearly of opinion that such evidence was not admissible unless brought home to the knowledge of the officers of the road.

Objection was taken to certain questions asked concerning Colwell's habits of intemperance which it was claimed was unknown to officers of the company. There is evidence tending to show that the officers of the company did have their attention called to the fact that Colwell had at times used beer if not stronger drink. The evidence may not be very strong but the weight and importance to be given it were questions proper for the consideration of the jury. Having had their attention called to the fact, in view of the great danger likely to result should one in Colwell's position be likely to indulge in the use of intoxicating liquors, it became their duty to make careful and frequent investigation upon the subject. In my opinion there was sufficient evidence to be submitted to the jury upon this question as the information given was certainly sufficient to put the company upon its guard.

Except as to the specific acts of incompetency as already noticed, I am of opinion that there was upon all the other questions sufficient evidence to be submitted to the jury, within the rule laid down in *Conely v. McDonald* 40 Mich. 150, and as a new trial must be ordered, I consider it more prudent not to enter upon any extended discussion of the evidence in support of this view.

A question was also raised in reference to remarks made by counsel upon the final argument of the case. I doubt whether the question was properly raised, or even if raised whether it comes within the rule laid down in *Scripps v. Reilly* 35 Mich. 371, but as the question is not likely to be of much importance upon a new trial, no definite opinion need be expressed.

For the errors already pointed out I am of opinion the judgment should be reversed with costs and a new trial ordered.

The other Justices concurred.

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James Van Horn v. The People.

Dog-taxes.

Act 198 of 1877 taxing dogs and appropriating the resulting fund to the payment of damage done by dogs to sheep, is not strictly a tax law within the contemplation of article xiv of the Constitution, but is an exercise of the police power of the State.

Taxes, as contemplated by article xiv of the Constitution, are burdens, charges or impositions for *public* uses, and not mere regulative expedients to repress private mischief and redress private injuries.

Dogs are properly subjected to special and peculiar regulations for the purpose of repressing the mischief likely to be done by them to more valuable property and to persons.

Error to Livingston. Submitted Apr. 27. Decided June 8.

Complaint against defendant, as supervisor, for refusing and neglecting to ascertain the number of dogs in his township liable to taxation, and to make a duplicate list of their owners showing the number of dogs kept by each and the amount for which he was to be taxed therefor. Defendant brings error. Exceptions overruled.

B. T. O. Clark for plaintiff in error. Taxation involves a ratio or rule of apportionment: *Woodbridge v. Detroit* 8 Mich. 301; dogs are property: *Heisrodt v. Hackett* 34 Mich. 283.

Attorney-General *Jacob J. Van Riper* for the People. The Legislature's power in legislation is as unlimited as that of Parliament, except when restrained by written constitutions: *Thorpe v. Rutland R. R.* 27 Vt. 142; *Sears v. Cottrell* 5 Mich. 251; the power of taxation may be extended as far as the government sees fit: *M'Culloch v. Maryland* 4 Wheat. 428; the constitutional requirement that taxation on property shall be according to value impliedly excepts special taxes on sales of liquor, poll taxes, dog-taxes, etc.: Cooley Const. Lim. 618; *Walcott v. People* 17 Mich. 68;

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Kitson v. Ann Arbor 26 Mich. 325; *Anderson v. Kerns Draining Co.* 14 Ind. 199; *Lafayette v. Jenners* 10 Ind. 75; *Bright v. McCollough* 27 Ind. 223; *Glasgow v. Rowse* 43 Mo. 489; *Baker v. Cincinnati* 11 Ohio St. 534; *Youngblood v. Sexton* 32 Mich. 406; dog taxes are within the police power of a state: Cooley Const. Lim. 412; *Carter v. Dow* 16 Wis. 299; *Mitchell v. Williams* 27 Ind. 62; *State v. Cornnall* id. 120.

GRAVES, J. The defendant holding the office of supervisor refused to execute the statute of 1877 (Public Acts of 1877, p. 239) and for such delinquency was prosecuted and convicted under the eighth section. The case was then certified to this court for review on exceptions. The scheme embodied in the statute is intended to compel those who own and keep dogs to provide a common fund for repairing or at least mitigating such losses as are inflicted by those animals by wounding and destroying sheep. It was not necessary for the face of the enactment to explain the proneness of dogs to such mischief. The fact is notorious and the mention of it as an incentive to the legislation would have been useless.

The exceptions are all grounded on a single assumption. And it would be needless to inquire as to how far the inferences and secondary propositions are authorized. The fundamental proposition is that the exaction attempted by the statute is a tax within the meaning of article 14 of the Constitution; and taking this for granted it is then argued that it is not a specific tax, but a tax falling under rules and principles applicable to other taxes; and not being laid according to any mode of uniformity nor assessed according to the cash value of the property, the imposition is unconstitutional. It is also suggested that dogs are included in the mass of property annually taxed under the general law and that it is not competent to select one species of property and subject it to double tax. It is unnecessary to point out the various inaccuracies of this reasoning. The foundation on which it proceeds is fallacious. The supposition that the statute is

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an emanation from the taxing power, in the sense in which that power is regarded by article 14, is a mistake.

The enactment does not appear to be for revenue nor to raise money by way of tax as that expression is there made use of. A tax in the view of that division of the Constitution is a burden, charge or imposition for public uses (*People v. Salem* 20 Mich. 452; *Matter of the Mayor* 11 Johns 77) and not a mere regulative expedient, as this is, to favor the repression of private mischief and promote the redress of private injuries. And it is plain therefore that the act can neither be brought within article 14 for the purpose of sustaining it or for the purpose of overthrowing it. It is a species of legislation which pertains to another department of power, and where the State in pursuing its duty to accommodate as far as practicable the desire and the right to keep dogs, to the more beneficial right of breeding and keeping sheep, has seen fit to apply the method marked out in this statute. The act is an exertion of the police power, and no reason is perceived for denying its validity. In consequence of the acknowledged excellence of some of their traits and their remarkable attachment to mankind, and on account, at the same time, of their liability to break through all discipline and act according to their original savage nature, and because also of their liability to madness, it has been customary always to make dogs the subject of special and peculiar regulations. The evidence found in our own statutes is very full: Act of 1805, 1 Terr. L. p. 69; Act of 1825; Code of 1827, p. 481; Rev. Stat. 1838, p. 220; Rev. Stat. 1846, p. 201: Act 161 of 1850, Sess. L. p. 155; Act 210 of 1863, Sess. L. p. 362; Act 205 of 1865, Sess. L. p. 340; Act 195 of 1873, Sess. L. vol. 1, p. 483.

Characteristic legislation has been expounded in other states, and the authority for it has been liberally maintained under the power referred to: *Blair v. Forehand* 100 Mass. 136; *Carter v. Dow* 16 Wis. 298; *Tenney v. Lenz* id. 566; *Mitchell v. Williams* 27 Ind. 62; *Morey v. Brown* 42 N. H. 373; *Woolf v. Chalker* 31 Conn. 121; *Ex parte Cooper* 3 Texas. C. App. 489.

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As the charge laid on the owners of dogs is a pecuniary burden imposed by public authority, it partakes no doubt of the character of a tax, and for many purposes might be so spoken of without harm. But no accession of public revenue, either general or local, is authorized or aimed at. The end sought is different. The purpose is to prescribe a regulation under which dogs as animals dangerous to sheep and of far less public utility can alone be held, and which if carried out will tend to discourage an undue increase of dogs, and at the same time will afford new protection against the effects of the mischief to which they are most given. As no sufficient reasons are disclosed for sustaining the exceptions they must be overruled, and the circuit court is advised to proceed pursuant to law.

The other Justices concurred.

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James Hamilton v. The People.

Bastardy—complaint—demurrer to specific charges—Jury cannot pass on sufficiency of complaint—Impeachment of witness.

A complaint for bastardy made March 20, 1880, and alleging existing pregnancy, is not invalidated by complainant's uncertainty whether it was caused September 15, October 1 or October 15, 1879, it appearing also that the child was born June 26, 1880.

A complaint for bastardy may properly be read at the trial, especially where complainant and defendant are thoroughly examined and cross-examined, and the complainant's examination covers everything which the complainant set forth.

A witness cannot be impeached by contradiction on collateral matters.

A jury cannot pass on objections to the sufficiency of a complaint for bastardy nor decide whether evidence has been improperly received under it.

Objections to specific charges in a complaint for bastardy as irrelevant and unsustained by proof, should be specifically made, and not raised by a general objection that the court should have charged the jury that the complaint must set forth the time and place of the offence and the allegation must accord with the law of nature and that proofs must be confined to the complaint.

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Certiorari to St. Joseph Circuit Court. Submitted April 27. Decided June 8.

BASTARDY. Respondent brings *certiorari*. Affirmed.

William L. Stoughton for plaintiff in certiorari, as to insufficiency of complaint, cited Comp. L. § 1973; Tiff. Crim. Law, 265; *Hull v. People* 41 Mich. 167; *Cross v. People* 10 Mich. 25; the evidence to impeach complainant was competent: *Strang v. People* 24 Mich. 6; *People v. Benson* 6 Cal. 221; Stephen on Evid. 179; 2 Whart Cr. L. §§ 1151-2.

Attorney General *Jacob J. Van Riper* for the People. A complaint for bastardy was held sufficient which alleged that between the 1st and 15th days of July, 1853, complainant was made pregnant with a child: Tiff. Crim. Law 266; *Beals v. Furbish* 39 Me. 469; if other acts may be shown, at one of which the child may have been begotten, it can be alleged: *Bassett v. Abbott* 4 Gray 69; *McNamee v. People* 31 Mich. 473; a question as to a fact which could not have been connected with the act complained of could not be asked by way of impeachment: *Dunn v. Dunn* 11 Mich. 285; *Geary v. People* 22 Mich. 222; *Newcomb v. Griswold* 24 N. Y. 299.

CAMPBELL, J. Plaintiff, who was defendant in a bastardy charge, brings *certiorari* to review the proceedings. The first error complained of relates to the sufficiency of the complaint. This was made on the 20th of March, 1880, and set forth the existing pregnancy of Mary Gloman, the complainant, and mentioned that it arose from three acts of intercourse had September 15, October 1, and October 15, 1879, but which of these she was unable to state. Hamilton was arrested, examined, and bound over, to appear in the circuit court for St. Joseph county. The child was born June 26, 1880.

We think the complaint was sufficient, and that there is nothing legally or otherwise impossible in the alleged ignor-

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ance, when the complaint was made, which of the three acts of intercourse led to the result.

The objection to reading the complaint on the trial at the circuit is frivolous. The statute requires it, and it is necessary to inform the jury concerning the precise charge. We need not consider what effect it might have by itself in evidence. It was given no effect of that kind here, and the complainant was thoroughly examined and cross-examined, and so was the defendant. Her examination covered all the matters set out in the complaint, and the jury acted on the evidence.

It is also objected that testimony was shut out of statements made in January, 1879, by the complainant to one Eugene Fort, that she was then in illicit relations with one Carpenter. The court, however, did not shut out this testimony. The witness answered the question in the negative. A dispute then arose in which the defence claimed they could introduce such questions for purposes of impeachment. The court said it might be done by way of cross-examination, but that it related to collateral matters and could not be contradicted. The defence insisted on offering it as a foundation for impeachment.

The ruling was correct. A witness cannot be impeached by contradiction on matters purely collateral. It was impossible for conduct in January, 1879, to have any bearing on the birth of the child in the summer of 1880. But after an answer had been received we do not see how this question could have arisen until an attempt had been made to contradict her. There is no ground on which complaint can properly be made of the rulings.

Objection was also made that the court erred in refusing to charge that the complaint must set forth the time and place of begetting the child, and that this must accord with known facts and the law of nature, and that the proofs must be confined to such complaint.

We do not think the court was bound to lay down any abstract views to the jury. If defendant desired to object to the sufficiency of the complaint, that was a proper ques-

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tion which had been previously raised and decided by the court. It was not the business of the jury to decide it. Neither was it the business of the jury to determine whether evidence had been improperly received. If there was supposed to be no testimony to go to the jury that question might have been presented definitely. And if specific charges in the complaint were deemed irrelevant or unsustained by proof they also should have been specifically noted.

But if, as we suppose, defendant desired to claim there was not evidence to go to the jury on the only real issue in the cause, which was the paternity of the child as begotten at one of the times set forth in the complaint, we have no doubt the jury fully considered the whole subject and had evidence authorizing the verdict they rendered. The complainant swore positively to every act set out in the complaint, and the jury were told that any wilful falsehood would authorize them to treat it all as unreliable, if it should so strike them. The defendant was sworn on his own behalf and the jury seem to have believed complainant, as they had a right to do, and disbelieved him.

We discover no error in the proceedings, and they must be affirmed with costs.

The other Justices concurred

JOSEPH P. LE ROUX ET AL. RELATORS v. BAY CIRCUIT JUDGE.

Removal of causes—Procedure.

Where removal papers have been filed to transfer a case from a State to a federal court, an order from the State court is unnecessary to complete the transfer, and if entered is nugatory.

A party who desires that a cause removed to a federal court should proceed in the State court, should move the federal court to remand it, and if his motion is denied he has a remedy by Act of Congress whereby his rights can be determined by the Supreme Court of the United States.

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Mandamus to vacate order of removal. The respondent made an order staying the further prosecution in the circuit court of a suit brought by relators against Salmon S. Mathews and others, and removing the cause to the circuit court of the United States for the eastern district of Michigan. Relators ask for a *mandamus* to vacate the order. Submitted and denied June 8.

Griffin, Dickinson, Thurber & Hosmer for the motion.

PER CURIAM. No order of the circuit court is necessary to complete the transfer of a cause from that court to the courts of the United States after the necessary papers for the removal have been filed, and where such an order has been made in the circuit court, the vacating thereof would have no effect upon the cause. Where a cause has been removed to the United States court, and the party opposed to such removal wishes to have the cause proceed in the State court, he should make a motion in the United States court to have the cause remanded, and if the motion is denied he has a remedy given him by Act of Congress whereby the question can be passed upon by the Supreme Court of the United States. And as the question involves the proper construction of an act of congress it is eminently proper that the remedy thus provided should be pursued and not resort to the State court.

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JAMES M. DUNLAP v. TOLEDO, ANN ARBOR & GRAND TRUNK RAILWAY COMPANY.

Condemnation of lands—Commissioners of appraisal—Certiorari.

Jurisdiction to appoint commissioners of appraisal in proceedings to condemn land cannot be conferred by notice served only on a person who is in no way connected with the owner of the premises and has only gone on them to receive service by collusion with those interested in the condemnation.

Certiorari will lie to review proceedings to condemn land when void for want of jurisdiction; though it should not be favored where any other remedy is adequate.

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A writ of *certiorari* in cases involving interference with important works ought not to be allowed unless applied for as soon as practicable; and if granted after the expiration of the twenty days allowed for an appeal in proceedings to condemn land, will not be sustained unless the delay in suing it out is satisfactorily explained.

Certiorari to Oakland Circuit Court. Submitted January 21. Decided June 15.

PROCEEDINGS under Act 198 of 1873, art. 2, secs. 18-26, to condemn lands for railway purposes. Claimant brings certiorari. Proceedings quashed.

E. J. Bissell and *F. A. Baker* for plaintiff in certiorari. Substituted service in condemnation proceedings cannot be authorized where it is not necessary: Cooley Const. Lim. § 404; *Settlemier v. Sullivan* 97 U. S. 444; *Knox v. Miller* 18 Wis. 397; *In re Empire City Bank* 18 N. Y. 216; certiorari is proper in this case: *Specht v. Detroit* 20 Mich. 168.

H. C. Waldron, *A. C. Baldwin* and *C. & W. N. Draper* for defendant in certiorari. Certiorari lies only to review erroneous proceedings of inferior tribunals where there is no other available remedy: *Edgar v. Greer* 14 Ia. 211; *Farrell v. Taylor* 12 Mich. 113; if defective service deprived the circuit court of jurisdiction, an appeal would carry up the whole record: 2 Wait's Actions 138; *People v. Board of Health* 33 Barb. 346; *Meeks v. Windon* 10 W. Va. 180; one who can obtain redress by appeal cannot take his remedy by certiorari: 12 Am. Dec. 531, n; *Clary v. Hoagland* 13 Cal. 174; *Baker v. Halstead* Busb. (N. C. L.) 41; *Witkowski v. Skalowski* 46 Ga. 41; *Peacock v. Leonard* 8 Nev. 84, 157, 247; *In re Mount Morris Square* 2 Hill 27; *Storm v. Odell* 2 Wend. 287; *People v. Betts* 55 N. Y. 600; nor can he where his statutory remedy is gone before the Supreme Court is applied to: *Withington v. Southworth* 26 Mich. 381; *The King v. Eaton* 2 D. & E. 89; *Zink v. Langton* Doug. 749; service is good where a copy of the notice is left at the usual place of residence of the party to be served: *Walke v. Bank of Circleville* 15 Ohio 298; *Grant v. Dal-*

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liber 11 Conn. 234; especially if notice is served on his wife: *Augusta v. Windsor* 19 Me. 317; *Scott v. Coleman* 5 Litt. 349; *Ames v. Winsor* 19 Pick. 247; *Wright v. Oakley* 5 Met. 400; *Morrison v. Underwood* 5 Cush. 52; *Tilden v. Johnson* 6 Cush. 354; *Orcutt v. Ranney* 10 Cush. 183; *Bujac v. Morgan* 3 Yeates (Penn.) 258; *Heatherly v. Hadley* 2 Oreg. 269; *Frean v. Cruikshanks* 3 McCord 84; *Brownfield v. Dyer* 7 Bush 505; *Hughes v. Osborn* 42 Ind. 450; the service was sufficient in this case: *Wheeler v. Wilkins* 19 Mich. 80; *Mechanics Bank v. Snowdon* 2 Paige 298; *Matteson v. Smith* 37 Wis. 333; *Northrup v. Shephard* 23 Wis. 513.

CAMPBELL, J. In this case, which is a proceeding to condemn lands for a railroad, the original notice was served on a person who was in no way connected with Dunlap, and who had gone on to his premises for the purpose of having service made on him so as to bind Dunlap. The service was clearly illegal and known to be so by the representatives of the railroad who procured his action, and there was no jurisdiction to appoint commissioners of appraisal. The proceedings should not have been confirmed.

It is objected that *certiorari* is an improper remedy, and that resort should have been had to an appeal. While it is true that *certiorari* should not be favored where any other remedy is adequate, yet it will undoubtedly lie for want of jurisdiction. But in cases involving the interference with important works, the writ ought not to be allowed unless applied for as soon as practicable. The time for appeal is limited to twenty days, and we shall not feel disposed to sustain a *certiorari* granted after a longer time, unless under circumstances clearly explaining and accounting for the delay. In the present case it was granted at once and no want of diligence existed.

The proceedings must be quashed as to plaintiff in *certiorari* with costs of this court and of the proceedings below.

The other Justices concurred.

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THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY v. THE PEOPLE OF THE STATE OF MICHIGAN.

Taxing stock of railway corporations—Res judicata—Estoppel of State—Consolidation of companies—Decision on the merits—Interest.

The result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents.

Where a statute requires a corporation to be taxed at a certain rate upon its capital and on loans employed in the State, and the Auditor General merely computes the amount of the tax on the basis of reports made to him by the company, but without passing judgment upon their correctness, the State is not precluded from enforcing payment of the correct amount.

The State is not concluded by the mere non-action of one of its officers, if he has not ascertained the facts and passed judgment.

Where both parties desire, and the public interest demands, that a court pass upon the merits of a case, and preliminary objections do not go to the jurisdiction, the main case may be disposed of.

A railway company is taxed, not for the face of the bonds upon which it negotiates a loan, but for the amount of the loan.

Stock dividends and issues of stock proportioned to that previously held by shareholders, must stand on the same footing with original stock and should be taxed as far as it is considered paid in.

The general railroad law, in permitting the consolidation of railroad companies within the State with others beyond its boundaries, contemplates leaving the domestic company in its original position as to stock and loans, and annexing to its capital and loans those additions which are made proportional to the original amounts.

Interest upon money withheld is allowed either because there is an express or implied promise to pay it, or as damages; but no promise can be implied until the principal falls due, and it is not allowable as damages if there has been no final understanding as to how much is to be paid.

Interest upon the amount of a tax which it is claimed should have been paid, cannot be allowed where the amount claimed has never been levied and is not therefore in default.

Error to Wayne. Submitted Jan. 26. Decided June 15.

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ASSUMPSIT. The declaration is as follows:

STATE OF MICHIGAN. } ss.
COUNTY OF WAYNE. }

In the Circuit Court for the County of Wayne:

The People of the State of Michigan, by Otto Kirchner, their Attorney General, complain of the Lake Shore and Michigan Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois, defendant, who has been heretofore duly summoned to answer the plaintiffs of a plea of trespass on the case upon promises, thereupon says:

That in the year 1846 the Michigan Southern Railroad Company was organized under Act No. 113 of the Laws of the State of Michigan of the year 1846, and by virtue of said act thereafter became the owner of a railroad running from Monroe, in the State of Michigan, through Adrian to the line of the State of Indiana, one hundred and twenty-nine (129) miles in extent, and also of a railroad from Palmyra to Jackson, in said State, forty-four (44) miles in length, together with all the usual appurtenances of such railroads, and also of certain steamboats provided for in said act. That section 31 of said act provides that "the said company shall pay to the State an annual tax of one-half of one per cent. upon its capital stock paid in, including the five hundred thousand dollars of purchase money paid or to be paid to the State, until the first day of February, 1851, and thereafter an annual tax of three-fourths of one per cent. upon its capital stock paid in, including the five hundred thousand dollars of purchase money aforesaid, and also upon all loans made to said company for the purpose of constructing said railroad, or purchasing, constructing, chartering, or hiring of steamboats authorized by this act to be held by said company, which tax shall be paid in the last week in January in each year to the State Treasurer."

That by virtue of Act number 138 of the Laws of Michigan for 1855, said Michigan Southern Railroad Company on the 25th day of April, 1855, became consolidated with a corporation of the State of Indiana, known as the Northern Indiana Railroad Company, thereby forming a new corporation, known as the Michigan Southern and Northern Indiana Railroad Company. Section 3 of said act of consolidation provides that "The said corporations

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to be organized by virtue of this act shall continue subject to the same rate of tax as though such consolidation shall not take place, and the amount of its capital and loans thereafter upon which such taxation shall be paid shall be such portion of the whole of its capital and loans as is actually employed within the State of Michigan, to be ascertained on or before the first day of January in each year by the Auditor General of this State from the annual reports of such corporation, or from such other reports on oath as he may deem necessary for such purpose to be ordered by him from the office of such corporation." That by virtue of two consolidations made under and in accordance with the general laws of the State of Michigan, one made the 6th day of April, 1869, and the other the 22d day of June, 1879, the first between said Michigan Southern and Northern Indiana Railroad Company and the Lake Shore Railway Company, another corporation, forming a new corporation called the Lake Shore and Michigan Southern Railway Company, the second between said Lake Shore and Michigan Southern Railway Company and the Buffalo and Erie Railroad Company, another corporation, forming by their union the said corporation defendant hereto; said defendant became possessed of the railroad and all other property formerly belonging to said Michigan Southern Railroad Company, and received by said Michigan Southern and Northern Indiana Railroad Company from said Michigan Southern subject to the duty of paying taxes to the State of Michigan as provided in said act under which said Michigan Southern Railroad Company was organized, and as provided in said act by which said Michigan Southern and Northern Indiana Railroad Companies were consolidated, and subject also to all debts, liabilities, and duties of said Michigan Southern and Northern Indiana Railroad Company which existed prior to its said consolidation into said defendant. And said plaintiffs aver that said Michigan Southern and Northern Indiana Railroad Company by virtue of its acceptance of said act, under which it was formed on said 25th of April, 1855, and in consideration of the rights it gained thereby, promised and was bound to pay to the State of Michigan a tax of three-fourths of one per cent. per annum on such portion of the whole of its capital and loans, as was actually employed in the State of Michigan; and promised and was bound to report to the Auditor General of said State, yearly, the amount of its capital and loans which was employed in the said State. And said plaintiffs aver that said Michigan Southern and Northern

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Indiana Railroad Company did not report to said Auditor General, from year to year, the full amount of its capital and loans actually employed in the State of Michigan, and did not pay the whole amount of the required tax upon its capital and loans actually thus employed. On the contrary, in the year 1862, and every successive year thereafter, up to and including the year 1869, said Michigan Southern and Northern Indiana Railroad Company actually employed in the State of Michigan three million dollars of its capital, and three million dollars of loans which were never reported to the Auditor General of said State for taxation, and upon which it always neglected and refused to pay the tax due as aforesaid. In consequence of said premises, said Michigan Southern and Northern Indiana Railroad Company was, at the time its property and rights passed to defendant by said consolidation, indebted to the State of Michigan for said unpaid taxes and interest thereon, in the sum of five hundred thousand dollars, which said indebtedness defendant assumed and promised to pay in and by the law under which it was incorporated and became entitled to the property of said Michigan Southern and Northern Indiana Railroad Company, and in consideration of the rights it gained by said consolidation. And plaintiffs aver that defendant from and after the said consolidation of June 22, 1869, in consideration of the rights gained by such consolidation, promised and was bound to pay to the State of Michigan an annual tax of three-fourths of one per cent., upon such portion of its capital and loans as was actually employed in the State of Michigan, and for the same consideration promised and was bound to report to the Auditor General of said State, yearly, the amount of its capital and loans which was employed in said State. And said plaintiffs aver that said defendant has not reported to said Auditor General, from year to year, the full amount of its capital and loans actually employed in the State of Michigan, and has not paid the whole amount of the required tax upon its capital and loans actually thus employed. *On the contrary*, in the year 1869, and every successive year thereafter, up to the time when this suit was begun, said defendant actually employed five millions of its capital stock and four millions of its loans in the State of Michigan, which it has never reported to said Auditor General for taxation, and upon which it has constantly neglected and refused to pay the tax due as aforesaid, and the amount of the tax thus due from defendant arising since and including said year 1869, together with interest thereon, is the sum of five hundred thousand dol-

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lars. And in consideration of said premises and its liabilities as hereinbefore stated on the first day of April, 1878, said defendant faithfully promised said plaintiffs to pay them the full sum of one million dollars, due as aforesaid. Yet the said defendant has disregarded its said promises, and has not (although often requested so to do), paid said sum of money, or any part thereof, to the plaintiffs' damage, one million dollars, and therefore they bring suit, etc.

OTTO KIRCHNER,

Attorney General.

The cause was tried before a jury and evidence was given of which the substance was: 1. That the Michigan Southern Railway Company was created and became a corporation under Act 113 of 1846, and that afterwards, under Act 138 of 1855, the Michigan Southern and Northern Indiana Railroads were consolidated under the name of the Michigan Southern and Northern Indiana Railroad Company.

2. That in 1869, the Michigan Southern and Northern Indiana Railroad Company under statutes of Michigan, Ohio, Pennsylvania, and New York, became consolidated with certain other corporations existing under the laws of Ohio, Pennsylvania and New York, for the purpose of constructing and maintaining certain railroads between the cities of Chicago, Toledo, and Buffalo under the name of the Lake Shore and Michigan Southern Railway Company, the corporation defendant in this suit.

3. That on the consolidation of the Michigan Southern and Northern Indiana Railroad Companies, shares of the corporate stocks of the new company were exchanged with the holders thereof for an equal amount, at par value, of the stock of the original companies surrendered; and that a similar exchange of stock was made upon the subsequent consolidations.

4. That the amount of the capital stock issued by the Michigan Southern Railroad Company, as fully paid prior to the consolidation with the said Northern Indiana Railroad Company, was $2,625,600, and that after such consolidation and before 1868, additional shares of stock were issued on

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account of the capital of said company issued in Michigan to the amount of $49,100.

5. That in 1868 the Michigan Southern and Northern Indiana Railroad Company declared a stock dividend of ten per cent. upon its then existing capital stock, and issued the same to its then existing stockholders, as fully paid.

6. That in 1871 the Lake Shore and Michigan Southern Railway Company issued to its then existing stockholders, stock to the amount of 40 per cent. of the stock then held by each of its said stockholders, and that for such stock issued, said company received in cash 33⅓ per cent. of the par value thereof, and without any other consideration thereof, issued the same as fully paid.

7. That subsequent to the said stock dividend of 10 per cent in 1868, and of the issue of said stock in 1871, the said corporation continued to pay taxes to the State of Michigan on account of its capital stock invested in Michigan, upon the same basis as it had paid prior to the issue of such stock, viz.: Upon a basis of $2,625,600 increased by $49,100, making $2,664,700; and that it has never paid any taxes to the State of Michigan on account of the increase of its capital stock, made by said stock dividend made in the year 1868, and the said issue of stock made in the year 1871.

8. That said Michigan Southern and Northern Indiana Railroad Company made a dividend to its stockholders out of its net earnings on May 1st, 1865, of three and one half per cent., and that after such dividend, said company made no other dividend until the close of 1868; that during the period from the 1st of May, 1865, to the close of 1868, said company actually earned a surplus over its operating expenses of $2,338,662, and that such surplus earnings were used for the purpose of construction, equipment and for contribution to the sinking fund, and that the sum of $1,178,267 thereof was used for construction and for new equipment, and that the stock dividend made in 1868, was to partially compensate the stockholders for the disposition which had been so made of surplus earnings. That the construction, on account of which said money was used, was chiefly outside

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the State of Michigan, and that the amount expended for permanent improvements on the railroad in Michigan during the period from 1862 to the time of the making of said stock dividend in 1868, was $46,080, besides what was expended for side tracks.

9. That the bonds issued by the said Michigan Southern Railroad Company for the purpose of obtaining money to be used for constructing said railroad, and purchasing, constructing and chartering, or hiring of steamboats, authorized by its charter to be held, were sold by the former company at an aggregate discount of $185,459.34; that none of such bonds were sold for more than their par value, and that no taxes have been paid to the State of Michigan on account of the amount of such discount, since the decree in the suit between the State and the Michigan Southern and Northern Indiana Railroad Company, hereafter mentioned.

10. That the Michigan Southern Railroad Company before consolidation with the Northern Indiana Railroad Company, issued bonds in form negotiable, called Jackson Branch bonds, which said bonds were executed with the intent and purpose of being used to obtain money for constructing the road of said company; that it loaned $250,000 in amount of such bonds to one Dwight, and received as security for such loan his, Dwight's, agreement, to return the said bonds at a time in said agreement specified; and as collateral thereto, bonds of the Chicago & Mississippi Railroad Company, to the amount of $337,000, and subsequently the said Dwight could not and did not return said Jackson Branch bonds so loaned to him, and the said $337,000 of the Chicago & Mississippi Railroad bonds were taken by the said Michigan Southern Railroad Company in payment for the aforesaid $250,000 of Jackson Branch bonds; and that the said $337,000 of the Chicago & Mississippi Railroad Company bonds eventually proved worthless and nothing has ever been realized thereon; and no taxes have been paid to the State of Michigan on account of the said $250,000 of Jackson Branch bonds, so-called, since the decree hereafter mentioned.

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11. That on the 18th of August, 1862, the Michigan Southern and Northern Indiana Railroad Company commenced suit by bill of complaint in the Wayne circuit court against Langford G. Berry, then Auditor General of the State of Michigan, in his official capacity, to restrain him from issuing a warrant to collect taxes alleged to be due from said Michigan Southern and Northern Indiana Railroad Company, to the State of Michigan, for the years 1858, 1859, 1860 and 1861, on account of the item before mentioned, $185,459.34, representing as before stated, the discount on bonds issued by said Michigan Southern Railroad Company, and said item of $250,000 represented by said Jackson Branch bonds, as hereafter stated; and that a decree was obtained restraining him accordingly.

12. That from and including 1865 up to the time it became consolidated into the Lake Shore and Michigan Southern Railway Company, in 1869, the Michigan Southern and Northern Indiana Railroad Company regularly made

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*EXHIBIT D.

OFFICE OF THE MICHIGAN SOUTHERN AND NORTHERN INDIANA R. R. Co.
TOLEDO, OHIO, January 23, 1866.

To the Honorable Secretary of State of the State of Michigan.

The Michigan Southern and Northern Indiana Railroad Company, in conformity with the requirements of the act entitled, "An Act to authorize the sale of the Southern Railroad and to incorporate the Michigan Southern Railroad Company," approved May 9, 1846, and of the act amendatory thereto, approved March 28, 1850, and of the act entitled "An Act to authorize the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company," approved February 13, 1855, respectfully submit the following REPORT for the preceding year to the first day of December, 1865.

1. The length of their road and branches in the States of Michigan, Ohio, Indiana and Illinois, including leased lines operated by them, and exclusive of 4 miles from White Pigeon to Constantine, now let to other parties, is 514 miles.
2. The cost of construction of their lines was $13,619,184.89.
3. The indebtedness on account of construction: none.
4. Other indebtedness is as follows: funded debt $8,536,500; floating debt $210,000.
5. The amount of capital stock outstanding is $10,424,500.
6. The amount of capital paid in is $10,424,500.
7. The loans made for the purpose of constructing the railroads of the consolidated company, or purchasing, constructing, chartering or hiring steamboats amounts, as heretofore reported, to $7,653,000.

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reports to the Secretary of State of the said State of Michigan, in the form and substance, so far as regards the questions of this case, of Exhibit D, hereto attached,* which exhibit is a copy of the report of said company made for the fiscal year 1865; and that it filed a report for the year 1869 up to May 31st, 1869, when it became consolidated into the Lake Shore and Michigan Southern Railway Company, by which it appeared that subsequent to its last previous report the capital stock of the said Michigan Southern and Northern Indiana Railroad Company had been increased by an amount equal to the stock dividend of ten per cent., made as aforesaid in 1868; but said report did not disclose in what manner nor for what purpose, nor for what consideration such increase had been made.

13. That after the consolidation of such company in the year 1869 into the Lake Shore and Michigan Southern Railway Company, said latter company regularly filed its reports with the Secretary of State as required by its charter, for each year up to the comencement of this suit. Said reports were similar in form and substance to the report for the

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8. Dividends last year—two of five per cent. each on the guaranteed stock, and one of three-and-a-half on the common stock.

9. The receipts from freight were $2,559,194.87; from passengers $2,116,113.96; from all other sources an operating account $210,404.92.

10. The number of through passengers was 148,336, way passengers 787,041.

11. Expenditures for repairs of road $603,617.76; repairs of engines and cars $465,855.68; other operating expenses $1,687,794.66; for construction, none.

12. Number of engines 98; of passenger cars 100; of freight cars about 1350; of other cars 25.

13. Average number of men employed last year about 2200.

14. Number of miles run by passenger trains about 850,000; by freight trains about 1,150,000; by other trains about 240,000.

15. Under the third section of the consolidation act they report that the portion of their capital and loans actually employed in the State of Michigan is $3,612,255.27. But under the decision of the Supreme Court of the State of Michigan in January, 1862 and of the Circuit Court of Wayne County in January, 1865, the company are held liable to the specific tax of three-fourths of one per cent. upon $4,739,240.16.

All of which is respectfully submitted.

E. B. PHILLIPS, } *Directors.*
ALBERT KEEP, }

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year 1872, marked Exhibit F.† The said report so filed for the year 1872 disclosed that the capital stock of said company had been increased since its prior report by the amount of 40 per cent., sold and issued to its stockholders as hereinbefore stated. But said report did not disclose in what manner nor for what purpose nor for what consideration such increase had been made.

14. That all reports so made by the Michigan Southern Railroad Company, and by the Lake Shore and Michigan Southern Railway Company, stated the amount of capital stock and loans actually used in Michigan, and liable to pay to the State of Michigan the specific taxes of three-fourths of one per cent., imposed by the charter of said Michigan Southern Railroad Company, in the exact language used in

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†EXHIBIT F.

OFFICE OF THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.
CLEVELAND, O., January 1873.

To the Honorable the Secretary of State of Michigan.

The Lake Shore and Michigan Southern Railway Company (successors to the Michigan Southern and Northern Indiana Railroad Company), in conformity with an act entitled "An act to authorize the sale of the Southern Railroad and to incorporate the Michigan Southern Railroad Company," approved May 9, 1846, and of the Act amendatory thereto approved March 28th, 1850, and of the Act entitled, An act to authorize the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company, approved February 13th, 1855, respectfully submit the following report for the year ending December 1st, 1872.

First. The length of their roads and branches in the State of Michigan, Ohio, (west of Toledo), Indiana and Illinois including leased roads operated by them, is 608 miles, (same as last report). This includes the following Michigan corporations making reports to the State.

Detroit, Monroe and Toledo	65 miles.
Kalamazoo and White Pigeon	36 "
Kalamazoo, Allegan and Grand Rapids	58 "
Erie and Kalamazoo	33 "

Second. The cost of construction of their various roads and branches as enumerated was $14,654,881.48

Third. Indebtedness on account of construction, none.

Fourth. Other indebtedness on the roads west of Toledo enumerated in Section 1, is $10,313,000

Fifth. Amount of capital stock of the consolidated company (Buffalo to Chicago) December 1st, 1872, was $50,000,000

Sixth. Amount of capital stock paid in December 1st, 1872, was $50,000,000

Seventh. The loans made for the purpose of constructing the railroads of the consolidated Michigan Southern and Northern Indiana Railroad Company or for purchasing, constructing, chartering, or hiring steamboats amounted, as heretofore reported, to $7,653,000

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that respect in the reports of said Michigan Southern and Northern Indiana Railroad Company for the years 1865 and 1872, of which Exhibits D and F are copies. That the said reports so made by the Michigan Southern and Northern Indiana Railroad Company, and the said Lake Shore and Michigan Southern Railway Company to the said Secretary of State, were by said Secretary of State placed on file in the office of the Auditor General of said State as required by law.

15. That the said Auditor-General kept in his office a book called a specific tax ledger, in which he kept an account with the Michigan Southern and Northern Indiana Railroad Company, and subsequently with the Lake Shore and Michigan Southern Railway Company, and upon the receipt of each of the reports so made by the said Michigan Southern

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Eighth. Dividends during the year, two of four per cent. each.

Ninth. The receipts of the consolidated company (Buffalo to Chicago) for the year named, were as follows:

From freight	$12,381,675.63
Passengers	4,147,950.14
Other sources	804,646.48
Total,	$17,334,272.25

Tenth. The number of foreign passengers 396,338
" " " local " 1,597,376

Eleventh. Expenditures:

Repairs, roads including new iron, &c.,	$4,058,994.10
" engines and cars	1,723,411.88
Other operating expenses	6,927,419.57
Construction	7,944,362.29

Twelfth. Number of engines 417
Number of passenger cars 124
" " freight " 8,835
" " second class and emigrant cars 41
" " baggage, mail and express " 80

Thirteenth. Average number of men employed 11,000

Fourteenth. Mileage, number of miles run by passenger trains 2,594,658
Number of miles run by freight trains 6,981,300
" " " " " other " 3,603,197

Fifteenth. Under the third section of the consolidation Act, they report that the portion of their capital and loans actually employed in the State of Michigan is $3,612,255.27, but under the decision of the Supreme Court of the State of Michigan in January, 1862, and of the Circuit Court of Wayne County in January, 1865, the company is held liable to the specific tax of ¼th of one per cent. upon $4,739,240.16.

All of which is respectfully submitted.

S. WITT, } DIRECTORS
H. B. PAYNE, } L. S. & M. S. Ry.

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and Northern Indiana Railroad Company, and the said Lake Shore and Michigan Southern Railway Company, the said Auditor General estimated and charged upon the said specific tax ledger, the amount of the specific taxes due from said company for the year covered by such report, and that said Michigan Southern and Northern Indiana Railroad Company and afterwards the Lake Shore and Michigan Southern Railway Company, from year to year paid the taxes so estimated and charged against it.

16. That the stock hereinbefore mentioned as sold to the stockholders of the Lake Shore and Michigan Southern Railway Company, to the amount of forty per cent. of the holding of each of the said stockholders, was so sold for the purpose of obtaining money to be used for construction; and that the money so obtained was chiefly used for such purpose outside of the State of Michigan.

17. That from and including the year 1862 up to the commencement of this suit, but a comparatively small amount of money was expended in improvements on the line of the old Michigan Southern and Jackson Branch Roads, or on account of construction or for equipment for use upon said roads; and that said roads during all the period aforesaid, remained in substantially the same condition, save that steel rails were substituted for iron, the cost of which over and above the value of the iron taken up was charged to operating expenses and paid out of current earnings, and the number of miles of side track was considerably increased. That the amount expended for side tracks from the year 1872 to 1878 both inclusive, was about $77,000; that what amount, if any, was expended for such purpose prior to 1872, does not appear; whilst during the period from the consolidation in 1869 to the commencement of this suit, the gross amount expended on account of construction upon the defendant's entire line, exceeded $15,000,000, not including expenditures for equipment.

18. The defendant operates 1176.81 miles of railroad; its main line extending from Chicago in the State of Illinois, to Buffalo in the State of New York. That from Elkhart,

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Indiana, to Toledo, Ohio, it has two lines; one through Michigan and one through Indiana and Ohio. 151.09 miles of its road are operated under lease, and 170.41 are held under the charter of the said Michigan Southern Company. That its road in Michigan is a single track, whilst between Toledo and Buffalo it is a double track, and greatly more expensive of construction and valuable per mile; that it has extensive and costly station grounds and buildings at Chicago, Toledo, Cleveland, Erie, Dunkirk and Buffalo, and shops at Elkhart. That for the year 1879, the proportion of traffic over the Michigan road was about three per cent. of the whole traffic; that the per cent. of traffic over the Michigan road varied from year to year, and that as compared with other States it has been constantly diminishing.

19. That the stock of defendant is now fifty millions of dollars, and its bonded debt about thirty-six millions and five hundred thousand dollars, and that the present market value of said stock and bonds is near ninety six millions of dollars.

The court instructed the jury as follows, to wit:

I. The plaintiffs are entitled to recover the tax of three-fourths of one per cent. for the years 1872, 1873, 1874, 1875, 1876 and 1877, upon the sum of $185,459.84, as part of a loan to the old company, notwithstanding the amount realized by said company on said loan was by reason of discounts allowed thereon, reduced that sum below the par value of the same.

II. Plaintiffs are entitled to recover interest on the last mentioned item from the day of the commencement of this suit.

III. Plaintiffs are entitled to recover the tax of three-fourths of one per cent. for the years 1872, 1873, 1874, 1875, 1876 and 1877, upon the sum of $250,000, being the amount of the Jackson Branch bonds (so called).

IV. Plaintiffs are entitled to recover interest on the last mentioned item from the day of the commencement of this suit.

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V. Plaintiffs are entitled to recover the tax of three-fourths of one per cent. for the year 1872 on the increase of capital stock employed in the State of Michigan.

VI. The amount of such increase upon which the tax in the last request mentioned is to be assessed, is the sum of $738,216.

VII. The plaintiffs are entitled to recover the tax of three-fourths of one per cent. for the years 1873, 1874, 1875, 1876 and 1877, on the increase of capital stock employed in the State of Michigan.

VIII. The amount of such increase upon which the tax mentioned in the last request must be assessed, is the sum of $1,052,048.

IX. The plaintiffs are entitled to interest upon each year's item of taxes mentioned in the fifth, sixth and seventh requests, to charge from the first day of February of each year next after the year for which the tax became due and payable.

The defendant, by its counsel, excepted to the giving of each of said instructions.

The jury found for the plaintiff, assessing damages at $83,484.85. Defendant brings error.

E. W. Meddaugh and *Ashley Pond* for plaintiff in error. The courts will follow the long practical construction of a law established by the administrative departments of the State: *Clark v. Mowyer* 5 Mich. 462; *United States v. Gilmore* 8 Wal. 330; *Edwards Lessee* 12 Wheat. 206; an action for unpaid back taxes will not lie where the sum due has not been ascertained: Act 138 of 1855, § 3; and where a different remedy is provided: Cooley on Taxation 13, n. 1; act 57 of 1872 requiring the Auditor General to assess the amount of tax against a company refusing to report a basis for valuation, and providing for an appeal to the Ingham Circuit Court and a review by the Supreme Court, applies to the corporation defendant: see *Branin v. Conn., etc., R. R.* 31 Vt. 214; *Peters v. St. L. & Iron Mountain R. R.* 23 Mo. 107; *Bank of Pennsylvania v. Com.* 19 Penn. St. 144;

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Jefferson Bank v. Skelly 1 Black 436; *Providence Bank v. Billings* 4 Pet. 514; 2 Redf. Railways 406-8, n.; the State cannot recover interest in an action for unpaid taxes which have never been assessed: Hilliard on Taxation 16, 444; *Danforth v. Williams* 9 Mass. 324; *Haskell v. Bartlett* 34 Cal. 281; *Himmelman v. Oliver* id. 246; *Camden v. Allen* 26 N. J. 398.

Otto Kirchner and *Chas. A. Kent* for defendant in error. An estoppel does not operate against the sovereignty: *People v. Brown* 67 Ill. 436; *Doe v. Maxwell* 10 Ired. 110; *Doe v. Roe* 4 Hawks. 116; especially from an act done ministerially by the officer whose course is relied on as a foundation for it: *United States v. Railroad Co.* 1 Fed. Rep. 700; *Bank v. United States* 19 Wall. 227; *King v. United States* 99 U. S. 229; *United States v. Tilden* 24 Int. Rev. Rec. 99; *Street Railway Co. v. Philadelphia* 51 Penn. St. 465; *Railroad Co. v. Slack* 26 Int. Rev. Rec. 60; interest can be recovered as damages for the non-payment of money: Sedgwick on Damages (6th ed.) 463.

MARSTON, C. J. In many respects this case resembles the *Michigan Southern & Northern Indiana R. R. Co. v. Auditor General* 9 Mich. 448; and *People v. The Michigan Southern & Northern Indiana R. R. Co.* 4 Mich. 398.

Some preliminary questions have been raised, which it was claimed should dispose of the present controversy, without the necessity of passing upon what might be considered the merits, and these perhaps had better first be disposed of.

As to the proceedings in the Wayne circuit court in chancery commenced in 1862 and in which a decree was rendered restraining the Auditor General from collecting taxes claimed to be due the State from the company for the years 1858 and 1861 inclusive, on account of the discounts and Jackson branch bonds hereinafter referred to, I am of opinion such proceedings are not *res adjudicata* against the State in this case. If in the present case the State sought to recover the taxes for 1858–9–60 and '61 which were then in controversy

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and the collection of which was restrained by the decree rendered in that case, the company might well say the State was concluded, and the mere fact that the decision was acquiesced in by the State, from necessity, would be no answer. Such, however, is not the present case. This action was commenced in 1880 and the State was permitted to recover taxes for the years 1872 and subsequent thereto. The decree in the Wayne circuit would not prevent the State from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance except as a precedent. In this case it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich., already referred to, and as that case is reported there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause but one arising since then, and the State is not in this case seeking to recover any portion of the taxes the collection of which was restrained in that case.

The Auditor General having assessed the company upon the reports made by it, for the several years covered by this action, and such assessments having been paid, it is claimed that in the absence of fraud by the company the action of the Auditor was final.

The Auditor General is required to ascertain and estimate, from the annual report made by the company, the amount of the tax chargeable against it, and for this purpose he may require the company to make farther and additional reports. It is not claimed that there was any fraud practiced by the company, and the Auditor General seems to have been satisfied with the annual reports as made, as

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he did not call for anything farther. An examination of one of the reports made, all being alike, shows that the company gave therein the aggregate amount upon which it claimed the State could tax it, but whether correct or not, or whether the company was not liable to pay a tax upon the items in controversy in this case the Auditor General from the report could not determine. The company did not set up or present the facts in its report concerning these disputed items and leave it to the Auditor General to exercise his judgment and make an assessment therefrom. Had the company done so and the Auditor made his assessment therefrom, or had he called for a further report, or in any way passed upon the facts and made an assessment accordingly, the question presented would have been very different. In this case the Auditor General seems to have accepted the conclusion of the company as to the amount upon which it was liable to pay taxes, and having done so the amount of the tax was a matter of computation, a merely ministerial act. The only discretion or judgment he exercised, if any, was to not call for a farther report, but this was not a discretion or judgment passed upon any facts, but if anything, simply that he would not ask for or look into the facts at all. The law declared that the company should pay a certain tax upon its capital and loans actually employed in this State. From this the Auditor General had no power to exempt or relieve the corporation, and if in making and filing its report the corporation did not set forth the correct amount, the neglect or failure of the Auditor General to perform his duty would not operate as a payment or discharge to the company. The State ought not to be concluded by the mere non-action of one of its officers. It is sufficient for the protection of all, to hold the State bound, where an officer ascertains the facts and passes judgment thereon. The company made out its report upon a mistaken basis, and if it thereby misled the Auditor the State should not be the loser.

A question was suggested whether, admitting the position taken by the State to be correct, any suit would lie until the

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Auditor General of his own motion or by *mandamus* had charged the tax sought to be recovered. As I understood counsel for the railroad company, they did not wish to press this objection, if upon such assessment hereafter being made, a recovery could be had. The company desired, and the public interests demand, that the entire matter in dispute should be passed upon on the merits. In such cases courts do frequently pass upon the merits, where the objection does not go to the jurisdiction of the court. See *Youngblood v. Sexton* 32 Mich. 406.

It seems to me, in any view that can be taken of this case, we must hold that the opinions in the cases referred to in 4 and 9 Mich. settle beyond all controversy the liability of the company to pay taxes on the stock items of $267,470 and $584,578. We must in my opinion directly overrule both those cases before we can arrive at a different conclusion, and this we are not prepared to do. Upon this part of the case it is not necessary to repeat what was there said.

As to the item of $250,000 bonds issued and loaned to one Dwight. It appears that those bonds were issued to obtain money for constructing the road of the company, but before using them they were loaned to Dwight, he agreeing to return the same bonds at a time agreed upon, and giving as collateral thereto certain bonds of another railroad company.

Dwight failed to return the bonds as agreed, and the bonds received as collateral proved of no value. It is therefore evident that no sale or exchange of the company's bonds was made or contemplated, but an unauthorized loan not sanctioned by the charter of the company or any one acting under authority for it. Had these bonds been exchanged for material to be used in the construction of the road, I can well see that the company should be obliged to pay a tax thereon, even although the material had been lost or destroyed before it was actually used by the company. Here there was neither sale nor exchange, but a loan, and the specific bonds loaned were to be returned, and it was only upon the failure to make such return that the company

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endeavored to realize from the collaterals which it held. Even if the company had power to ratify the loan, this could not be considered simply as a ratification, but as an effort to protect itself from the injurious effects of an illegal transaction. The company was held liable to taxation upon this item in the case in 4 Mich., upon the facts as there presented, upon the presumption that the bonds received were the equivalent of those issued, but as was said in 9 Mich., no such presumption can here be indulged in, it affirmatively appearing that the bonds received were of no value.

The next item is that of $184,549.34, representing the aggregate amount of discounts allowed or paid by the company in making loans. This was expressly passed upon in 4 Mich., and it was there held the company was liable to taxation thereon. In my opinion the conclusion there arrived at should be adhered to. I think the popular understanding is that the amount of a loan is that represented by the face of the obligation and not the amount received, and this I think must have been the intent of the Legislature. This view avoids all danger and difficulties that might otherwise be raised in the sale and negotiation of bonds, growing out of the commissions paid, or because of the fixed rate of interest or otherwise the bonds sold above or below par.

The court below permitted the State to recover interest, and this I think was erroneous. Whether the reports made by the company were correct or not, until an assessment or charge was made by the Auditor General and notice thereof given the company, it was not in fault for not paying. Some act by the Auditor General was necessary before the tax became due and payable. Interest is allowed where money is withheld, either upon the ground of a promise express or implied to pay interest or as damages for default in retaining money due and owing another. But upon whatever ground it may be placed, in the absence of an express promise, until the principal becomes due, no promise to pay interest can be implied, or be awarded as damages.

CAMPBELL, J. I feel reluctant to take any steps in this cause, because the action of the Auditor General cannot be

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anticipated, or any step taken to enforce a tax that he has not levied. But as the questions do not differ materially from those which have arisen before, I am not disposed to withhold my views.

Upon all of the questions which have been up previously, I adhere to the views which I expressed in the case decided in 9 Mich. I think that a loan *made to* the company cannot include money not loaned to them; and that if they borrow a sum for which they give obligations beyond the amount received, there is no loan made to them for the excess. The statute is designed, as I think, by its terms, to tax their actual receipts in money or its equivalent in property, or some other value, and not to tax their liabilities.

I agree that the stock dividends and issues of stock proportioned to that previously held by shareholders must stand on the same footing with original stock, and should be taxed as far as it is considered paid in. The arrangements allowing consolidation very clearly, in my opinion, were intended by the law to leave the Michigan company, which is the only one over which this State has any actual power of enforcing its laws directly, in its original position as to stock and loans, and to annex to its capital and loans those additions which are made proportional to the original amounts. The Michigan investment can never be less than what it was in the first place, and if gains are made which take the form of paid-up stock, each dollar of stock thus divided must be treated as having earned its share. There is no other possible way to discriminate between the Michigan and foreign investments, for neither stock nor loans are very often expended specifically in one place more than in another.

I am, therefore, of opinion that the items for bonds for which no equivalent was received, and the discount on bonds sold at less than par should not be taxed, but that the stock dividends to the amount reckoned as paid in should be taxed. No interest can be charged, because the tax has never been levied, and is not in default.

GRAVES, J. concurred.

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COOLEY, J. having been of counsel for the people in a former litigation between the parties as to a similar subject-matter, did not sit in the case.

MAYOR OF DETROIT, RELATOR v. WM. B. MORAN ET AL.

Municipal corporations—Approval of resolutions passed by common council —Absence of mayor.

The charter of Detroit provides that resolutions of the common council shall be presented by the city clerk to the mayor for approval, and that if they are not approved or vetoed before the next meeting of the council they shall take effect without his signature. *Held*, that the mayor has the full period between the presentation of the resolution by the clerk and the next regular meeting thereafter, in which to act; and that his powers are not affected by the action of the clerk in withholding the resolution until a regular meeting has intervened.

The charter of Detroit invests the president of the common council with the powers of the mayor in case the latter is unable to perform his duties by reason of absence from the city. *Held*, that advantage cannot be taken of his temporary absence to approve a resolution of the council if he is not disabled from returning in time to act upon it himself before the next regular meeting.

Quo warranto. Submitted April 15. Decided June 15.

Otto Kirchner for relator.

Maybury & Conely and *John D. Conely* for respondents. The legality of a Board of Park Commissioners was declared in *People v. Lothrop* 24 Mich. 235; *Park Commissioners v. Common Council* 28 Mich. 228.

MARSTON, C. J. The charter of Detroit provides that certain resolutions, etc., of the common council before taking effect shall be presented by the clerk to the mayor, who, if he approves the same, shall write thereon his approval with the date thereof. If he does not approve, he shall return such resolution to the common council with his objections in writing, and if he neglects to approve or return the same

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at the next regular meeting after it shall have been presented to him by the clerk, the same shall go into effect.

We are clearly of opinion that the mayor has until the first regular meeting of the common council, after the clerk has presented to him such a resolution, to approve or disapprove of the same. The clerk by withholding the resolution over a regular meeting after its passage by the council cannot thereby deprive the mayor of his right or make it effective, nor does it matter what length of time may intervene between the date of its passage and presentation, and the next regular meeting. The mayor has the full period in which to exercise the power conferred upon him.

In case of a vacancy in the office of mayor or of his being unable to perform the duties of his office by reason of sickness, absence from the city, or other cause, the president of the common council shall be acting mayor, vested with all the powers and authorized to perform all the duties of the mayor during such vacancy or the period of such inability. It is not claimed that there was a vacancy, but that the mayor was absent from the city, and therefore that the acting mayor had authority in the premises.

It appears that this resolution was passed by the common council on May 28th; that on the 29th day of May it was by the clerk presented to the president of the common council, who, as acting mayor, signed the same; that on the afternoon of the same day the mayor, who was absent from the State on the 28th and forenoon of the 29th, returned and addressed a communication to the common council returning to them this resolution with his objections, and that the next regular meeting was held on June 4th. It also appears that the clerk and president were both informed that the mayor would return to and be in Detroit on the afternoon of the 29th in time to act upon this resolution before the time for the next regular meeting.

Was this such an absence from the city as would authorize the president to approve of this resolution as acting mayor? We are clearly of opinion that it was not. It is not sufficient to justify the president in acting, that the mayor is

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absent from the city. If it were his stepping beyond the corporate limits for never so short a period would confer upon the president power to act—a construction which would be so productive of mischief that it could not be supposed to have been so intended by the Legislature. It is only when the mayor is *unable to perform the duties of his office by reason of absence* from the city that the president can act. The absence in this case would not disable him from performing his duties, as he had until the next meeting of the council, and the president of the council could not anticipate a disability that did not in fact exist, and by a hasty approval of a resolution, deprive the mayor of his right to consider the same.

Under recent legislation we do not deem it proper to discuss some of the other questions raised, and as at present advised it will not be necessary to render any judgment in the case.

The other Justices concurred.

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ELI STILSON v. CHARLES GIBBS.

Trover for unlawful levy—Justification—Custody of property—Exemption from execution.

A deputy sheriff having levied upon wheat in the mow, threshed and removed it before selling it, and in an action of trespass on the case for unlawful seizure and sale sought to justify by showing that when he had levied on a former crop under the same judgment, the defendant had removed it in the night. But as it appeared on cross-examination that it was removed by the holder of a chattel mortgage thereon it was *held* that the justification, if it was one, failed and that the evidence should have been stricken out.

Placing a keeper in charge of property under levy is a sufficient precaution for its protection unless violence is apprehended.

Seed wheat being necessary to the business of wheat farming is material which, within the limits defined by Comp. L., § 6101, is exempted from execution against the farmer.

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Error to Kalamazoo. Submitted Apr. 15. Decided June 15.

CASE. Plaintiff brings error. Reversed.

Edwards & Sherwood for plaintiff in error.

Arthur Brown for defendant in error. An officer's wrongful act in making a levy does not divest the owner of his property nor prevent its being applied in payment of the execution, and when so applied the amount mitigates the damage of the wrongful taking: *Montgomery v. Wilson* 48 Vt. 616; *Collins v. Merriam* 31 Vt. 622; *Briggs v. Gleason* 29 Vt. 78; *Stewart v. Martin* 16 Vt. 402; *Lamb v. Day* 8 Vt. 407; *Board v. Head* 3 Dana 494; *Squire v. Hollenbeck* 9 Pick. 551; *Pierce v. Benjamin* 14 Pick. 356.

COOLEY, J. This case was once before in this court, and the decision is reported in 40 Mich. 42. The action was trespass on the case for the unlawful seizure and sale of a mow of wheat belonging to the plaintiff. The defendant justified as sheriff under an execution issued on a judgment in favor of one Sebring. After making the levy the deputy of defendant had proceeded to thresh the wheat in disregard of the plaintiff's remonstrance, and had then removed it to a village several miles off before selling it. This he claimed a right to do in his discretion, but this court held that no such general right existed, and that if the officer claimed that there were special facts which made such a proceeding proper, the burden was upon him to prove them. On a second trial the officer has undertaken to make such proof, and in the opinion of the jury he seems to have succeeded.

If there were any facts in proof which fairly tended to a justification for the threshing, we must accept the conclusion of the jury as final. From the record it seems that such showing as was made came from one Stringham, who was deputy sheriff of the same county and had an execution on the same judgment four years earlier. His testimony was as follows:

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"I was up there [at Stilson's] and levied on a lot of wheat. I had permission to put it in this granary. He turned out his granary to put it into. He wished me to leave it there until he could replevy. He was going to replevy, he said, immediately. The wheat was in two places. Got it together in the granary. He turned me out the granary and the lock and key to lock it up with. He said I could have it in welcome, and when he got the replevy, why of course that would be sufficient; that would settle the matter. I locked it up, took the key and went home. That night about 11 o'clock I was notified he was running the wheat off. I lived in Augusta then, about 3½ miles from him. I went up there and found that that was the case, and part of it was gone. I went in and took possession of what was left. I think I saw him. He had a number of men at work for him—two teams I think there were drawing wheat for him—drawing it off. I don't remember whether I had any controversy with Stilson himself about the wheat or not. I know I did with some of his men. I think he was in the barn or about the barn there."

This apparently makes out a somewhat strong case of making away with the property levied upon, but not much is left of it after the cross-examination. "I knew," he says, "there was a chattel mortgage on this same wheat when I made this levy. I presume Stilson told me of the mortgage when I made the levy. I think it was a man by the name of Woodworth who had the mortgage. I think he lived in Calhoun county. That wheat was in two different parcels a mile apart. I helped move one parcel to the barn where the other was the same day I made the levy. I locked it up in the granary. Stilson made no objection to my taking it and putting it in there. I think he furnished me with the lock. I did not leave the wheat in his possession there. He told me that it would be perfectly safe. I think Stilson gave me the mortgage, and told me Mr. Woodworth wanted me to file it. I don't remember Mr. Stilson told me that I ought to notify Mr. Woodworth—think he did not. I won't say that he did not—I don't remember. He said if I did not notify Woodworth he would. I would not say he did not or did. Mr. Woodworth met me there at the barn about the wheat. It was after I had taken one load to Augusta, and about eleven or twelve o'clock that night that he met me. He claimed to own this wheat. When I went back there quite a pile of the wheat had been taken away. Mr. Woodworth seemed to be interested in the matter of

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taking it away; seemed to be giving directions there. I did not know the man who was taking it away. Woodworth forbid my touching it. I think Stilson did not forbid me. Woodworth seemed to be exercising control over the wheat. I was there perhaps two hours at that time. I took away part of the wheat and Woodworth replevied it from me." "I can't swear positively that I spoke to Stilson that night. The conversation was principally with Woodworth. There were several men there. I don't know of Stilson ever making an effort to move that wheat. Don't think he ever said he would move a kernel of it. Don't think he ever said anything on that subject, except that he would replevy, or that Mr. Woodworth would replevy it. Mr. Stilson did not object to my levying on the wheat, nor to my putting it in the barn. I don't say he said he would replevy it."

We are not prepared to say that if it had appeared that the defendant in the execution had in one case secretly removed from the custody of the officer threshed wheat which the latter had levied upon, this would have justified another officer several years afterwards in assuming that he would do the same with wheat in the mow, and in thereupon taking the extraordinary step of threshing it before a sale, as the proper and suitable means of precluding a clandestine removal. It would naturally occur to most officers, we think, that the proper means of protecting property levied upon would be to put a keeper in charge; and unless violence was apprehended, this must be deemed a sufficient precaution. But in this case the attempt to show that Stilson removed the wheat levied upon by Stringham failed utterly. The showing to that effect which Stringham seemed to make on his direct examination was wholly refuted on the cross-examination, and nothing was left of it to submit to the jury. The judge should have stricken out the evidence when the plaintiff made a motion to that effect.

An error was also committed in respect to a claim to exemption made by the plaintiff. He was entitled under the statute to hold as exempt provisions for the comfortable subsistence of his family for six months; and the officer insists that he left sufficient wheat for that purpose. But

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the statute also exempts "the tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars"—and the plaintiff claimed a right to show that he had prepared ground for sowing wheat, and sufficient was not left him for seed. Seed is unquestionably necessary to enable one to carry on the business of farming; and his seed wheat may therefore be included by the farmer in making up the $250 which the statute exempts for him as stock in business. The judge should have received the evidence.

The judgment is reversed with costs, and a new trial ordered.

The other Justices concurred.

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PATRICK MCLAUGHLIN v. JAMES SALLEY.

Assumpsit for tenant's share of crop of wheat—Testimony as to reputation for truth and veracity.

After a lease was cancelled the landlord told the tenant to put in and harvest fall wheat, and promised that he should have his just and lawful share of it, but afterwards harvested and kept it himself. *Held*, that they were tenants in common of the wheat under a valid agreement, and that the tenant could maintain *assumpsit* on the common counts for the value of his share.

After a witness, called to sustain the credit of a party, has testified that he is acquainted with him and has lived in his neighborhood for many years but does not know his reputation for truth and veracity, he may also be asked whether he has ever heard it questioned

Error to Wayne. Submitted April 15. Decided June 15.

ASSUMPSIT. Defendant brings error. Reversed.

Hawley & Firnane for plaintiff in error. Assumpsit does not lie for wheat wrongfully taken unless it has been

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converted into money: *Watson v. Stever* 25 Mich. 387; a jury should have a chance to learn the character of a witness from those who know him: *Phillips v. Kingfield* 19 Me. 375; and a witness as to character should be allowed to say whether he has ever heard it questioned: *Bucklin v. State* 20 Ohio 18; *Hadjo v. Gooden* 13 Ala. 718; *Dave v. State* 22 Ala. 23; *Boon v. Weathered* 23 Tex. 675.

W. B. Jackson for defendant in error.

MARSTON, C. J. Salley brought suit in justice's court, declared upon the common counts and filed a bill of particulars. After judgment the case was appealed to the circuit, where judgment was rendered in favor of the plaintiff, and the defendant now asks for a reversal because of two alleged errors.

The plaintiff gave evidence tending to show possession of a farm belonging to the defendant under a lease, which was subsequently cancelled, that after the lease was cancelled the defendant told the plaintiff to go and put in fall wheat upon the farm, and that when harvested, he (plaintiff) should have his just and lawful share of it; that acting thereon he put in seven and a half acres of fall wheat, furnishing manure, seed, and all the necessary labor in putting it in; that when the wheat was ready to harvest he went on to harvest it, when the defendant ordered him away, harvested and kept the wheat. He also gave evidence as to the quantity, value, and his share or interest therein.

This evidence was objected to—1. Because not admissible under the declaration; 2. Because the supposed agreement was void under the statute of frauds; and 3. Because the language of defendant on which the plaintiff relied was too uncertain and indefinite to constitute a contract between the parties.

In this court counsel have insisted that as there was no evidence given tending to show that defendant had converted the wheat into money or money's worth, the plaintiff could not maintain *assumpsit*, and if he could he must have declared upon the special contract. If an action of *assump-*

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sit could be maintained I can see no objections to a declaration and recovery upon the common counts. The plaintiff in error relied upon *Watson v. Stever* 25 Mich. 386, as preventing a recovery in this form of action where the property has not been converted into money. *Tolan v. Hodgeboom* 38 Mich. 624, may also be referred to. In both of these cases no contract relations had ever existed between the parties for any purpose, and it was therefore very properly held that under the facts in those cases *assumpsit* could not be maintained. In this case, however, the evidence tended to show a valid agreement between the parties under which they became and were, if the testimony of the plaintiff was believed, tenants in common of the wheat, and thus the case was clearly brought within the ruling in *Fiquet v. Allison* 12 Mich. 330, and *Coe v. Wager* 42 Mich. 52.

The plaintiff below having sought to impeach the reputation of the defendant for truth and veracity, one George McMillan was called as a witness on behalf of the latter, and having testified that he was acquainted with the defendant and had lived in the same neighborhood for twenty-five years, but was unable to say whether he knew his reputation for truth and veracity in the neighborhood, he was then asked by defendant's counsel, "Did you ever hear McLaughlin's reputation for truth and veracity questioned?" This was objected to and the objection sustained. This was error as expressly decided in *Lenox v. Fuller* 39 Mich. 268, and for the reasons there given.

For this error the judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

Edward E. Bayliss v. The People.

Adultery—Jurisdiction of crimes committed on or near a boundary—Examination as to plea of guilty.

A complaint for adultery between a married woman and an unmarried man may be made by the woman's husband. Comp. L. § 7693.

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Offences committed at or within a point one hundred rods from the boundary between two counties may be prosecuted and punished in either county.

An examination of a prisoner by the trial judge to ascertain whether his plea of guilty is voluntary is not necessarily defective because made in open court and in the presence of the prosecuting attorney, though there may be cases where it should be private.

Error to Shiawassee. Submitted April 27. Decided June 15.

INFORMATION for adultery. Respondent brings error. Affirmed.

McKercher & Bush for plaintiff in error.

Attorney General *Jacob J. Van Riper* for the People. Complaint for adultery may be made by the husband or wife of the other party to the offence: *Iowa v. Roth* 17 Ia. 336; an offence done within a hundred rods of the county line may be prosecuted in either county.: *Com. v. Gillon* 2 Allen 502.

MARSTON, C. J. An information was filed against the respondent in the circuit court for the county of Shiawassee, charging him with having committed adultery with one Theresa Phœnix at the "Clinton House, an hotel in the village of Ovid in Clinton county, within one hundred rods of the dividing line between said county of Clinton and said county of Shiawassee." To this information the respondent pleaded guilty and was duly sentenced. The case is now brought here on writ of error, and the errors assigned are—*First*, that the complaint was not made by the wife of the respondent; *secondly*, that the information charged him with the commission of a crime in the county of Clinton; and *third* that an investigation, after plea and before sentence, was not made by the circuit judge as required the statute, Act 99 of the Session Laws of 1875.

The complaint was made by the husband of Theresa Phœnix, thus following the precedent adopted in *Parsons v. People* 21 Mich. 509, where the question was incidentally

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considered and the judgment affirmed. Our statute, section 7693, 2 Comp. Laws, in providing that "no prosecution for adultery shall be commenced but on the complaint of the husband or wife," must be construed in connection with the first section of the same chapter, which declares that when the crime is committed between a married woman and a man who is unmarried, the man shall be deemed guilty of adultery and liable to the same punishment. If in such a case the complaint could not be made by the husband of the woman such unmarried man could not be prosecuted or punished, which certainly was not the intention. We are of opinion that the complaint was properly made under our statute.

As to the second error assigned. The statute in express terms authorizes the prosecution and punishment in either county of offences committed on the boundary or within one hundred rods of the dividing line between two counties. § 7808.

The return of the circuit judge to the writ of *certiorari* issued in this case, shows that he made investigation and became satisfied that the plea of guilty was made freely, with full knowledge of the nature of the accusation and without undue influence. He farther returns that such investigation was made in open court, and that according to his recollection the prosecuting attorney and at least one of the officers of the court were in the court-room at the time. The mere fact that the investigation was made in open court, and that such third parties were present, is not fatal. The statute does not in express terms require a private examination to be made, and although there may be cases, where owing to the tender years of the accused, or for other reasons apparent to the circuit judge, a private examination should be had, yet we cannot hold such to be absolutely necessary. *Henning v. People* 40 Mich. 733; *Edwards v. People*, 39 Mich. 760.

We discover no error in the record and the judgment will stand affirmed.

The other Justices concurred.

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STATE TREASURER, RELATOR v. AUDITOR GENERAL.

Taxation of railway companies running partly in other States—Consolidation—Foreign companies.

The Michigan Southern Railway Company was established by the State of Michigan under a special charter which defined the basis on which it was to be taxed. The State afterwards authorized it to consolidate with the Northern Indiana Railroad Company, with no change in the basis of taxation, and a general railroad law was passed at about the same time. This law, and various similar acts afterwards passed, provided that companies within the State might consolidate with companies in other States, and that every corporation formed under the law should be taxed at a certain rate. The Michigan Southern and Northern Indiana Company meanwhile became part of the Lake Shore and Michigan Southern Railway Company under consolidation agreements with corporations in other States through which the route of the consolidated company lies and in which its business is done. A writ of *mandamus* sought for by the State Treasurer to compel the Auditor General to assess the company under the general law was denied; it is not a corporation formed under that law, and taxes are properly assessed upon the basis fixed by the original special charter.

A State cannot tax the whole track and equipments, the gross earnings, or the entire capital stock of a road which lies partly without its boundaries, and is partly operated in other States. It can only tax that part of the road property which lies within its jurisdiction, or the proportion of stock representing that part of the road.

A tax upon the gross earnings of a railway company whose road is partly outside of the jurisdiction, is illegal, not only because of the want of jurisdiction, but because it is not levied upon a rule of equality with corporations whose business is wholly in the State.

The State has the same power to authorize several existing corporations to associate themselves together and organize themselves into a new corporation, as it has to incorporate individuals.

A corporation is a creature of the sovereign will, and when created by one sovereignty it can operate within another's limits only by the latter's express permission, or by permission implied from principles of comity, but such permission does not make it any the less a foreign corporation.

Mandamus. Submitted June 7–8. Denied June 15.

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Attorney General *Jacob J. Van Riper* and *Fitch R. Williams* for relator. Corporations can be consolidated only by virtue of law and with legislative consent: *State v. Bailey* 16 Ind. 46; *N. Y. & Sharon Canal Co. v. Fulton Bank* 7 Wend. 412; the courts of Michigan have treated corporations formed by consolidation of companies under the general railroad law as new corporations, even where one has been merged in another: *Mansfield, Coldwater & Lake Mich. R. R. v. Drinker* 30 Mich. 124; *Swartwout v. Mich. Air Line R. R.* 24 Mich. 404; *Tuttle v. Mich. Air Line R. R.* 35 Mich. 247; *Detroit, Lansing & Lake Mich. R. R. v. Starnes* 38 Mich. 698; *Marquette, Houghton & Ontonagon R. R. v. Langton* 32 Mich. 252; *State v. Maine Central R. R.* 66 Maine 488; *Hamilton Mut. Ins. Co. v. Hobart* 2 Gray 543; *Commonwealth v. Atlantic & Gt. Western Ry.* 53 Penn. St. 9; *State v. Sherman* 22 Ohio St. 411; *Shields v. State* 26 Ohio St. 86; *Shields v. Ohio* 95 U. S. 319; *Clearwater v. Meredith* 1 Wal. 40; by such consolidation there was a voluntary surrender of all rights of exemption from taxation provided for the original corporations, and the new company at once became subject to the general railroad law: *Railroad Co. v. Maine* 96 U. S. 499; *Railroad Co. v. Georgia* 98 U. S. 359; *McMahan v. Morrison* 16 Ind. 172; *Lauman v. Lebanon Valley R. R.* 30 Penn. St. 42; intention to exempt from taxation must be explicit: *Minot v. Phil., Wil. & Balt. R. R.* 18 Wal. 206; *Farrington v. Tennessee* 95 U. S. 679; *New Jersey v. Yard* id. 104; *Com. v. Easton Bank* 10 Penn. St. 451; an express exemption from taxation lasts only as long as the charter, and if the charter is extended the power to tax is removed: *Gordon's Appeal* 3 How. 133; as to the legality of taxes upon property outside the State, see *Delaware Railroad Tax Case* 18 Wal. 206; *Erie Railway v. Pennsylvania* 21 Wal. 492; a Michigan corporation is liable to such taxes as the Legislature may constitutionally impose, whatever it pays elsewhere: *Quincy R. R. Bridge v. Adams County* 88 Ill. 615; *Racine & Miss. R. R. Co. v. Farmers' L. & T. Co.* 49 Ill. 331; *Mitchell v. Deeds* id. 416.

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Ashley Pond for respondent. The consolidation of corporations existing under the laws of diverse States cannot result in a corporation created by the laws of one of them: *Ohio & Miss. R. R. v. Wheeler* 1 Black 286; nor does it necessarily dissolve the constituent corporations and effect the creation of a new one; the question is one of legislative intention: *Cent. R. R. & Banking Co. v. Georgia* 96 U. S. 665.

Cooley, J. The controversy in this case concerns the proper basis for estimating the tax to be annually assessed by the State authorities against the Lake Shore & Michigan Southern Railroad Company in respect to that portion of its road in the State of Michigan. Its determination involves the construction of various statutes, but especially the General Railroad Law as originally passed and subsequently revised, and the application to this company of the provisions of that law respecting taxation.

The Michigan Southern Railroad Company was originally organized under a special charter. Laws of 1846, p. 170. The company purchased of the State an uncompleted railroad, and by its charter it was provided that "The said company shall pay to the State an annual tax of one-half of one per cent. upon the capital stock paid in, including the five hundred thousand dollars of purchase money paid, or to be paid to the State, until the first day of February, 1851, and thereafter an annual tax of three-fourths of one per cent. upon its capital stock paid in, including the five hundred thousand dollars of purchase money aforesaid, and also upon all loans made to said company, for the purpose of constructing said railroad, or purchasing, constructing, chartering or hiring of steamboats authorized by this act to be held by said company, which tax shall be paid in the last week in January in each year to the State treasurer, and the property and effects of said company, whether real, personal or mixed, shall, in consideration thereof, be exempt from all and every other tax, charge and exaction by virtue of any laws of this State now or hereafter to be in force, except penalties by this act imposed." Sec. 31.

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Afterwards, in the year 1855, an act was passed by the Legislature of this State "to authorize the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company." Laws of 1855, p. 300. The latter company was at that time operating a railroad from the point where the Michigan Southern Railroad at its westerly end intersected the southern boundary of the State, to Chicago, in the State of Illinois, and the consolidation would give to the consolidated company a continuous line from the eastern boundary of this State to Chicago, and also by means of the Erie & Kalamazoo Railroad, a leased road extending from Toledo, in the State of Ohio, westerly, and connecting with the line of the Michigan Southern Railroad at Adrian, a continuous line from Toledo to Chicago. One of the provisions of the act of consolidation was that "The said corporation so to be organized, by virtue of this act, shall continue subject to the same rate of tax as though such consolidation should not take place; and the amount of its capital and loans hereafter, upon which such taxation shall be paid, shall be such portion of the whole of its capital and loans as is actually employed in the State of Michigan, to be ascertained on or before the first day of January in each year, by the Auditor General of this State, from the annual report of said corporation, or from such other reports on oath as he may deem necessary for such purpose, to be ordered by him from the office of such corporation." Sec. 3.

The consolidation authorized by this act immediately took place, and the consolidated company appears to have been treated and considered as a new corporation from that time on. The same Legislature which passed this act of consolidation also passed a general law under which companies formed to construct railroads were authorized to incorporate themselves. By one of the sections of this law "every corporation formed" under its provisions was required to pay to the State an annual tax of one per cent. on the capital stock paid in. Comp. Laws 1857, p. 652.

The General Railroad Law was amended in 1869, by an

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act approved April 3d of that year, and one of the amendments changed the annual tax to "an annual tax of one per cent. on the capital stock paid in," and also upon all such sums of money "as shall from time to time be invested in the original constructing and stocking, or in any new constructing or stocking of said road." Laws 1869, p. 262. There was never any claim that up to this time the Michigan Southern & Northern Indiana Railroad Company was taxable otherwise than as provided by the charter of the Michigan Southern Railroad Company in the section above recited, and by the act of consolidation above mentioned.

Among other provisions of the General Railroad Law of 1855 was one that "Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company either in or out of this State, into a single corporation; *Provided*, That no such companies having parallel lines, or lines diverging and converging, but being conterminous, shall be permitted to consolidate themselves." The act pointed out the method in which the consolidation should be effected, and provided that when the proceedings were completed and the consolidation agreement duly filed in the office of the Secretary of State the consolidating corporations "shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned." Laws 1855, pp. 174, 175.

After the passage of the amendatory act of 1869, and within the same year, the Michigan Southern & Northern Indiana Railroad Company entered into consolidation agreements with certain Ohio, Pennsylvania and New York corporations, whereby it was intended to form a continuous line from Chicago to Buffalo in the State of New York, with various branches or side lines which need not be particularly mentioned. It is assumed in this case that there were statutes in the several States above named purporting to authorize such consolidation agreements, and they were carried into practical effect, and the consolidation agreements duly filed with the Secretary of State at Lansing as

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above provided. The consolidated company was now called the Lake Shore & Michigan Southern Railroad Company, and it paid taxes on the same basis on which they had previously been assessed against the Michigan Southern & Northern Indiana Railroad Company.

In 1871 the laws providing for the incorporation of railroad companies were revised, and the basis of taxation was essentially changed. Every company was thereby required to make to the Auditor General, an annual report which, among other things, should show the gross receipts of the company for the preceding year, and it was further required to pay to the State Treasurer an annual tax computed as follows: Upon the gross receipts to the amount of $3000 or less per mile of road regularly operated, one and one-half per cent; upon the gross receipts in excess of $3000 and less than $6000 per mile, two per cent.; and upon the gross income in excess of $6000 per mile three per cent. Laws of 1871, p. 354. No tax has ever been assessed against the Lake Shore & Michigan Southern Railroad under this law, or under the law next mentioned.

In 1873 the General Railroad Law of 1871 was revised and the basis of taxation again changed. The railroad companies "formed under the provisions" of the revising act were required to pay an annual tax upon all gross receipts not exceeding $4000 per mile of road actually and regularly operated, two per cent.; and upon gross receipts in excess of $4000 per mile, three per cent. But it was provided that "when a railroad lies partly within and partly without this State, there shall be paid such portion of the tax herein imposed as the length of the operated road lying within this State bears to the whole length of the operated portion thereof." Laws 1873, p. 532.

It is now urged on behalf of the relator that ever since the consolidation of the several companies heretofore mentioned into the Lake Shore & Michigan Southern Railroad Company, the consolidated company has been liable to taxation under the several railroad laws, and that the State authorities have erred in assessing taxes as provided by the

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charter of the Michigan Southern Railroad Company, or on any other basis than that from time to time prescribed by the General Railroad Law as amended and revised. And the purpose of this application is to compel the respondent, who is Auditor General of the State, to assess and collect of the Lake Shore & Michigan Southern Railroad Company a tax under this act of 1873 on the computation made for the purpose by the Commissioner of Railroads.

The capital stock paid in of the Lake Shore & Michigan Southern Railroad Company is reported at $50,000,000, and the State tax upon the company, had it been assessed according to the terms of the General Railroad Law as it stood up to 1869, would have been $500,000 annually. This is about nine times the amount now claimed as annually assessable against the company under the General Railroad Law as it now stands, and it is not pretended that it could be held to be in any sense a just tax, or a tax proportionate to what is charged against other subjects of taxation within the State. This disproportion is so great that it seems plain the Legislature never intended this enormous burden should be imposed, and it suggests the inference, if it does not require it, that the Legislature supposed the case of this company was specially provided for otherwise. It cannot be that the Legislature meant to tax other companies a certain per centage on a capital stock represented wholly by property within the State, and then to tax this company the same percentage on a capital stock represented by property by far the larger portion of which was in other States; especially when such property is permanent in its nature, and cannot by any implication of law or legal intendment be held or deemed to be property which is subject to or protected by the laws of this State. Indeed, if the intent of the General Railroad Law had been to bring this whole property within its provisions concerning taxation, it would be subject to the objection that the State was attempting by this law to reach out and subject to its sovereign power of taxation property situated in other States, liable and justly liable to taxation there, and thereby in some degree to shift the burdens of its own

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government from the subjects of taxation which should justly bear them, upon other subjects which were beyond its jurisdiction, and therefore not subject to its control for any purpose. For the State can no more tax the whole capital stock, which represents the track from Chicago to Buffalo, the rolling stock and other equipments, than it can tax the whole track and equipments. The capital stock is taken as the basis of taxation rather than the road and equipments for reasons of convenience; but whether the one or the other is selected for the purpose the limitations of sovereignty alike apply, and the State can tax only what is within its jurisdiction, whether it be the part of the road which is within its limits or the proportion of the stock which represents that part of the road. There may sometimes be difficulty in determining what is the just proportion of the stock which is thus taxable; but the principle is plain enough, and it is not likely the State ever intended to disregard it.

Like consequences would have attended the taxation of the railroad company under the act of 1871. That act required the levy of taxes on a basis measured by the gross earnings of all the roads; and it made no provision whereby the gross earnings of any road whose line was partly in other states might be apportioned for the purpose of this taxation. All the gross earnings of this railroad company, therefore, accumulated by the use of its lines in New York, Pennsylvania, Ohio, Indiana and Illinois, must have been taxed within and for the benefit of the State of Michigan; and the tax would not only have been illegal, because not levied by any rule of equality as between this company and other railroad companies, and unjust from its oppressive disproportion to other railroad taxes, but it would have been clearly in excess of State power for the reason above assigned. No State can have any authority to take advantage of the fact that a portion of a railway is within its limits to draw within its taxing power all the road or all its business. As well might it take advantage of the temporary presence of a non-resident within its limits to compel him to pay taxes on his homestead in another State, or on his business not carried

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on under the protection of its laws, or on the moneys or credits which he might chance to have about his person at the time of his visit. Any such attempt at taxation would be usurpation.

But the General Railroad Law as revised in 1873 does contain provisions whereby the tax may be apportioned when the road is partly within and partly without the State; and the objection that the State is attempting to tax property not subject to its jurisdiction will not be available against this law if we find its intent to be to bring the Lake Shore & Michigan Southern Railroad Company within its provisions. Whether the apportionment it provides for is a fair one, is questioned by counsel; but it was meant to be fair, and for the purposes of the validity of the law that was probably sufficient. The vital question is whether it was intended that it should apply to this company. Upon that question the fact that the provisions in the General Railroad Law as it before stood from time to time could not be applied, may have some bearing, since there is nothing in the wording of the act of 1873, any more than in the law at any time before, which is indicative of a clear intent that this company should come under its provisions. It is nevertheless possible that the Legislature may, at all times since the consolidation of the Lake Shore line, have intended to tax this company under the general law, and that the previous defects in the law were in mind when the act of 1873 was passed, and were intended to be cured thereby. To that act we may therefore now direct our attention.

The taxing provisions of the act of 1873 are expressly by its terms made applicable to "every company formed under the provisions" thereof. The argument on behalf of the relator is that when the consolidation of 1869 took place the Michigan Southern & Northern Indiana Railroad Company and the other companies in Ohio, Pennsylvania and New York with which it consolidated ceased to exist, and that the new company which succeeded to their corporate powers came into existence as a corporation in this State by virtue of the authority to consolidate, which was given by the Gen-

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eral Railroad Law then in force, and which was revised in 1873. The company, it is said, could not otherwise have had existence in this State, and was consequently in the strictest sense a corporation "formed under the provisions" of the act revised. It must therefore have been intended by the Legislature that the act of 1873 should apply to it, for that act was inconsistent with and repealed the previous general law, with its provisions respecting taxation.

Had all the consolidated companies been corporations of this State, possessing like powers, privileges and immunities, and had they proceeded to consolidate under the act of 1873, there would have been little or no difficulty in saying that they thereby ceased to exist, and were consolidated into one corporation "formed under the provisions" of that act. A State at its pleasure may authorize two or more existing corporations to associate together and organize themselves into a new corporation, with the same full power that it exercises when it incorporates individuals. *Bishop v. Brainerd* 28 Conn. 289: *Clearwater v. Meredith* 1 Wall. 25; *State v. Maine Central R. R. Co.* 66 Me. 488; s. c. in error 96 U. S. 499. There is no difficulty here, for each incorporation is effected by an exercise of the will of the same sovereign authority.

But how can it be said that the Lake Shore & Michigan Southern Railroad Company, owning and operating a line of railway in six States, and exercising within them corporate powers emanating from them all, is a corporation "formed under" the General Railroad Law of Michigan? Why under the law of Michigan any more than under that of Ohio or that of any other State? And what authority can the laws of Michigan have to authorize the company to operate a railroad in New York, or how can they punish a corporate misfeasance in Pennsylvania, or compel the performance of a corporate duty in Illinois? And if in any restricted sense it be said that the consolidated company is a corporation formed under our laws because their assent was given to its formation; then what are its powers, duties, liabilities and immunities? May the corporation exercise within this

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State powers which have been conferred in Pennsylvania or Ohio, but which our laws would expressly withhold, and is it released by the laws of New York from duties which our laws impose?

A corporation is the creature of the sovereign will. When one sovereignty creates it, it can operate within the limits of another only by the express permission of the latter, or by implied permission springing from principles of comity. If such permission were given by express law, it would not make the corporation any less a foreign corporation than before; it would still be the corporation of the State whose sovereign will had created it; and if two States should incorporate the same persons for the same purpose, with identical powers, there would in contemplation of law be two corporations deriving their authority from different sources. This would be altogether a different thing from one State granting the charter and the other giving permission for the exercise of the franchises within its limits.

The authority to consolidate the Lake Shore lines, as has been said above, was claimed under the laws of several States, and not under the laws of Michigan alone. Concede that the consolidation has resulted in one great corporation into which it has merged the others, and the fact remains that this is no more effected under the laws of Michigan than under the laws of any other assenting State. The consolidated company is not, therefore, a corporation formed under the laws of Michigan. The laws of Michigan were powerless to confer upon the new corporation all the powers and charge it with all the duties of the several old corporations: the State might consent to the consolidation, and this is all it assumed to do.

Whether by the concurrent action of all the States through or into which the Lake Shore line extends the Lake Shore & Michigan Southern Railroad Company can be said to have become a corporation in the full sense, or whether it is to be regarded as merely a corporation *de facto*, or whether the consolidation is to be considered a business union of several different railroad companies under one common name

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which the laws of the several States recognize for the purposes of the transaction of business, the holding of property and the bringing of suits, or whether all the old corporations are to be deemed still in existence and exercising their several powers in their respective States in the name of the consolidation, is not now important, and we do not care to speculate on the several interesting questions that here suggest themselves to our minds. It is enough for our purposes that the consolidated company is not in our opinion a corporation "formed under" the General Railroad Law of this State, within the meaning of that law, and that it is not, therefore, taxable under it. The Auditor General, we think, has acted in strict accordance with duty in continuing to levy the tax on the basis prescribed in the charter of the Michigan Southern Railroad Company and the act under which that company and the Northern Indiana Railroad Company were consolidated. The case is altogether different from what it would have been had the Michigan company which entered into the consolidation been organized under the general law.

Many questions discussed on the argument are rendered immaterial by the conclusion we have reached.

The writ applied for must be denied.

The other Justices concurred.

Sarah B. Corrie v. Daniel T. Corrie.

Divorce—Conflicting evidence.

A decree of divorce may be affirmed even though the evidence on which it was granted is so conflicting that different tribunals might come to opposite conclusions.

Appeal from Wayne. Submitted June 8. Decided June 15.

Bill for divorce. Defendant appeals. Affirmed.

John W. McGrath for complainant.

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James W. Romeyn for defendant.

GRAVES, J. The circuit judge passed on the evidence in this cause and reached the conclusion that complainant's application for divorce was fully sustained. We have carefully examined the testimony and find it very conflicting, and no doubt different tribunals on looking at it as it appears on paper might come to opposite determinations. And such might be the case after rejecting the depositions of Mrs. Corrie. It would be a waste of time to write out a discussion of the facts. The view we take is that the bias of the evidence is not such as to justify overruling the court of original jurisdiction.

The decree is affirmed with costs.

The other Justices concurred.

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CHARLES BRUNNER ET AL v. BAY CITY ET AL.

Joint suits—Bill to enjoin assessment.

Joint suits will not lie in a case in which there is no common interest on one side or the other.

A joint bill for relief against a tax sale will not lie where the complainants have no common grievance beyond being owners in severalty of distinct parcels of land sold for the tax.

A joint bill of complaint cannot be maintained if any one of the complainants alleges a grievance that is not of the same common nature with those of the rest.

Where the objection to a tax assessment is that it should not be for an aliquot part of a general charge, but for the separate benefit which the premises receive, the owners of different parcels have conflicting interests and it is doubtful whether they can join in a bill to enjoin the assessment.

Appeal from Bay. Submitted June 8. Decided June 15.

BILL to set aside tax sales and vacate sewer assessment. Defendants appeal. Reversed; bill dismissed.

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Scofield & Webster for complainants.

John E. Simonson for defendants.

CAMPBELL, J. This is a bill filed by a large number of persons whose lots have been bid in by Bay City under a sewer assessment to have the sales set aside as illegal. The ground of illegality is that the sewer itself was not authorized to be built, nor the assessments authorized to be made in the manner adopted.

Without going at length into the questions presented, we are met at the outset by a difficulty which we cannot overlook. We do not find any warrant for any such joinder of grievances. The city now occupies the same position which would be occupied by any other tax purchaser who might choose to bid off all of these parcels. Each complainant would have against him a single separate grievance, but it would not in law be a common grievance, merely because it was similar in its nature to the grievances of others. The assertion of his title against one would be by a separate action, and his action of ejectment could not implead any persons not interested in the parcel it involved. Matters in which there is no common interest on the one side or the other are not allowed to be litigated jointly; and while there are some classes of cases where the community of interest is not as plain as in others, we do not think they go far enough to warrant this suit.

The joinder of several parties similarly interested in resisting a common aggressor was originally allowed, to save multiplying litigation, to settle once and finally the matter in contention. It was at first strictly confined to cases where the act complained of, if done, or continued, would affect every one in the same way, and would affect all, if any. It was applied in questions of commons in pasturage, fisheries, and similar interests, and in questions of tithes, which were asserted over certain districts. It was extended on the same grounds to frauds or wrongs by corporate agents against the interests of corporators, public and private. It was finally applied to restrain taxes and assessments, in which the

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inhabitants of localities taxed, or the owners of land in assessment districts, were sought to be charged for a common burden. There is no doubt that in some of these cases the rule may have been extended somewhat beyond the line first laid down. But in all of the cases which have been well considered, there has been one cause of grievance which at the time of filing the bill involved some aggressive action in which all of the parties complaining were involved in precisely the same way. And we have held distinctly that in such actions, if any person set up grievances not of the same common nature with those of the rest, the bill could not be maintained. *Kerr v. Lansing* 17 Mich. 34. See also *Miller v. Grandy* 13 Mich. 540 and *Scofield v. Lansing* 17 Mich. 437; *Youngblood v. Sexton* 32 Mich. 406.

In the present case it may be doubted whether the complainants could have joined in a suit to enjoin the assessment, however illegal. The chief objection underlying the whole theory of the bill is that the assessment was not and could not lawfully be made upon any general and uniform system of apportionment; but that each lot should be assessed, not an aliquot part of a general charge, but so much as it was separately benefited by the work. It is very evident that each complainant is interested in enlarging the responsibilities of the rest and in diminishing his own. Instead of a community of interest their interests are hostile.

But when the assessment has been enforced by sale, we can see no reason why one purchaser should differ from another, or why the purchase of several lots should be regarded as a common wrong to the several lot-owners. He is not after his purchase capable of doing any act which can operate as a common grievance. Each act in the enforcement of his title is an independent and several injury, if it is a wrong at all, and no lot-owner is hurt by the wrong done to his neighbor. It would be like the exclusion of a person from a common or fishery, on personal grounds, and not on a denial of the general right. No joinder of complaints could be allowed in such cases.

We think Bay City cannot be sued in this way, and that

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if any lot-owner has an equitable grievance against the sale of his lot actually made, he must sue for it separately.

The decree must be reversed with costs and bill dismissed.

COOLEY and GRAVES, JJ. concurred.

MARSTON, C. J., being a resident tax-payer of Bay City, did not sit in this case.

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JONATHAN BOYCE v. JOSEPH MARTIN.

Apportionable contract—Change of conditions—Quantum meruit—Interest on advances—Estoppel—Orders for payment.

Suit on *quantum meruit* lies where the mode of performing an unapportionable contract is so changed that the contract price for what has been done cannot be determined. So *held* where a person was employed to cut and skid logs and put them into Muskegon river at three dollars a thousand, and after cutting and skidding a quantity his employer directed him to cut no more and to put such as had been cut into Cedar Creek, and there was nothing to show what relation the cutting and skidding bore to the whole work.

It is for the jury to determine whether a change in a contract was agreed upon by the parties, under instructions that the burden is on the party relying upon a new contract to prove it.

Interest will not be allowed on advances made under a contract, without an express agreement for it.

One who had contracted to put in logs, afterwards brought suit upon the *quantum meruit*, and it appeared that his daughter acting as his clerk had drawn the orders upon which the wages of the men were paid by the employer. *Held*, that plaintiff could show that he had no knowledge of the form of the orders, as in that case they could not tend to show that he was not acting merely as defendant's agent, and there was nothing in their payment by defendant to estop plaintiff from showing the circumstances under which they were drawn.

Error to Muskegon. Submitted June 8–9. Decided June 15.

ASSUMPSIT. Defendants bring error. Affirmed.

Edwin Potter and *L. N. Keating* for plaintiff in error.

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Nelson De Long for defendant in error.

MARSTON, C. J. We cannot concur with counsel for plaintiff in error in this case in his view that there was no evidence to support a recovery under the *quantum meruit* for cutting and skidding logs. The plaintiff's testimony tended to show an express contract under which he was to cut the logs and put them into the Muskegon river, and that after a certain quantity had been cut and skidded, the defendant directed him to cut no more, and afterwards gave farther directions that such logs should be put into Cedar Creek. This was such a change in the express contract, mutually agreed upon, as would enable the plaintiff to recover the fair value of the work done. There was no way under the old contract by which there could be an apportionment, and a part of the contract price allowed where but a part of the work had been done.

Had any portion of the logs been put into the Muskegon river, the contract price could have been allowed therefor. While that contract fixed the rate at three dollars per thousand for the entire work, it did not specify, and there was no evidence showing what part the cutting and skidding would bear to the whole work. The plaintiff's case did not proceed upon the theory that the change to Cedar Creek was agreed upon as a mere deviation or substitute and that in all other respects the original agreement was to remain in force, and this court cannot determine that question from the evidence; that was a proper question for the consideration of the jury; and the theory of both parties was submitted by the court to the jury, with instructions that the burthen of proof was upon the plaintiff in order for them to find that a new contract had been made.

The court committed no error in declining to allow the defendant interest upon the advances made by him. Under the original agreement and while it was in force the advances were made, and in the absence of an express agreement that he should receive interest thereon, he would not be entitled to make such a charge.

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The testimony introduced by the plaintiff to show that he had no knowledge as to the form of the orders drawn by his daughter and given the men and upon which the defendant paid their wages was proper. If the plaintiff had no knowledge of the form of the orders they could not operate against him or tend to show that he was not acting merely as the agent of the defendant, and there was nothing in the fact of the orders being given and paid by the defendant that could estop the plaintiff from showing the facts and circumstances under which they were drawn.

As we discover no error in the record the judgment will be affirmed with costs.

The other Justices concurred.

ADALINE ELDRED v. HENRY WOOLAVER.

Replevin—Value—Jurisdiction determined by damages.

G. in working for E. used his oxen which became injured, and E.'s agent agreed that G. might buy another yoke which E. should pay for, but G. should keep if on the final settlement the balance in his favor should be enough to pay for them. No settlement was made and E.'s agent had charged G. $125 for damages to cattle and for their use. G. sold the oxen to W. who sued E. for them in replevin. *Held*, that the question whether the oxen were worth the amount charged for them was inadmissible because there was no proof that G. had ever agreed to pay for their use or for the damage, and that he could not be liable for their use without such agreement and could only be held for the damage in an action in tort.

The value of property is not in issue in a replevin suit therefor except for the purposes of an assessment of value in defendant's favor.

In suing out a writ of replevin for property for which plaintiff had recently paid more than $100 and which defendant had taken from his possession without his consent, the plaintiff may properly regard his cause of action as within the jurisdiction of the circuit court.

It is not so much the value of the property in litigation as the damages involved which affects the jurisdiction.

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Error to Muskegon. Submitted June 9. Decided June 15.

REPLEVIN. Defendant brings error. Affirmed.

Jas. G. Campbell and *A. B. Allen* for plaintiff in error.

Nelson De Long for defendant in error. The sum claimed as damages is the test of jurisdiction: *Inkster v. Carver* 16 Mich. 484; *Strong v. Daniels* 3 Mich. 466; *Henderson v. Desborough* 28 Mich. 170.

COOLEY, J. The action in the circuit court was replevin by Woolaver against Eldred to recover possession of a yoke of oxen. Woolaver had purchased the oxen of one Gardner who had for some time been engaged in the performance of a logging contract for Eldred, in the course of which he had the possession and use of a yoke of oxen belonging to his employer. These oxen had become injured, and it was agreed between Gardner and the agent of Eldred that Gardner should be at liberty to purchase of a third person the oxen now in question, and that Eldred should pay for them, on the understanding that they should become the property of Gardner if the balance in his favor on settlement was sufficient to pay for them.

The parties never came to a final settlement, and it was a matter in dispute on the trial whether anything was due to Gardner when his contract was completed. Eldred's agent had charged Gardner with the sum of $125 on the books for damage to cattle and for their use, and when on the stand he was asked whether the damage and the use were equal to that sum. The question was ruled out, and this ruling forms the ground for an exception. The difficulty with the question was that there was nothing in the case to show that Gardner had ever agreed to pay for either the use of the oxen, or for any damage to them. Without such an agreement he could not be liable for the use, and he could only be held for any damage to them in some form of action in tort.

It is also assigned for error that the court had no jurisdiction, because the value of the property replevied was under

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one hundred dollars. This, it is said, appears from the appraisal, which placed the value at ninety dollars. In the declaration the value was alleged to be one hundred dollars, and damages for the detention were claimed to a still larger amount. The case made by the declaration was therefore not one within the jurisdiction of a justice of the peace. We have on two or three occasions alluded to some of the difficulties which attend this question, when the failure of jurisdiction—if the value is to determine it—can only appear when the value is shown by the appraisal after the writ is served, or by the evidence on the trial. *Kittridge v. Miller* 45 Mich. 478, is particularly referred to.

We do not care to consider these difficulties at this time, because the case does not call for it. The plaintiff had recently purchased the cattle at a price exceeding one hundred dollars, the defendant had taken them from his possession, without his consent, and he might well estimate his cause of action at a sum exceeding the jurisdiction of a justice of the peace in actions of tort. After obtaining the property on the writ, he was not interested in showing its value, except to reduce it as far as possible for the contingency of a failure in the suit which should entitle the defendant to recover the value. For no other purpose than for an assessment of value in defendant's favor does the value become an issue in the suit. But the value is many times of less importance than the damages.

Another question made does not require attention.

The judgment must be affirmed with costs.

The other Justices concurred.

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THOMAS RHEAD, ADMINISTRATOR OF THE ESTATE OF HORACE KARR v. ISAAC HOUNSON AND ALONZO HOUNSON.

Bill to set aside deed for fraud—averments of insolvency—Negligence of officer making levy—Deed of homestead—Redemption—Interest—Costs of cross-appeal.

A bill in aid of execution to set aside a deed as fraudulent as against the complainant, should show how it is so, and is too general if it

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merely alleges the fraud. But if the defendant does not object on the hearing, the defect is not open on an appeal.

An allegation of defendant's insolvency is not indispensable to a bill filed to set aside a deed as an obstacle to an execution. The fact of insolvency is important only as it bears on the question whether or not the deed is fraudulent as against the creditor who has made levy.

Allegations that defendant has not sufficient personal property in the county to pay the judgment and that the officer made an effort to find such goods, are not necessary to a bill in aid of execution.

Neglect to make due search for goods and chattels on which to levy, is a defect to be corrected in the court whence the writ issued, and is not open in a court of chancery under a bill in aid of an execution upon land.

A deed of a homestead cannot be avoided as in fraud of the rights of a judgment creditor. The holder is as free to dispose of it as though he were not a debtor.

A bill in aid of execution was filed against land which had been sold in contemplation of the issue of the execution. The land included a homestead, and the purchaser redeemed it from a mortgage against the judgment debtor. *Held* that the redemption raised an equity in the purchaser's favor; but as it benefited the homestead as well as the rest, the amount of land subject to sale on execution was what was left after setting apart the homestead parcel and so much besides as was found on appraisal of the whole to be worth that proportion of the redemption money which was paid to release the homestead. Interest on the mortgage was not allowed where it did not clearly appear that the purchaser had paid it and it was shown that he had his the use of the land long enough to counterbalance his claim therefor.

Costs of the Supreme Court were not allowed either party as against the other, where both appealed and where the decree was only modified as to the losing party.

Appeal from Lenawee. Submitted June 9. Decided June 15.

Bill in aid of execution. Both parties appeal. Decree modified.

Melville McGee for complainant. A voluntary conveyance from father to son without consideration, and having the effect of hindering creditors, is a fraud in fact: Comp. Laws, § 4713; *Buck v. Sherman*, 2 Doug. (Mich.) 176;

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Fellows v. Smith, 40 Mich. 689; *Allen v. Kinyon*, 41 Mich. 282; *Smith v. Rumsey*, 33 Mich. 183; a defendant in a bill to set aside a deed is not entitled to the property as a homestead when he has not claimed it in his answer: *Stevenson v. Jackson*, 40 Mich. 702; *Herschfeldt v. George*, 6 Mich. 456.

C. A. & J. A. Stacy for defendants.

GRAVES, J. In 1874 one Burgess held a note for $500 signed by defendant Isaac Hounson and decedent Karr, and Hounson agreed with Karr to assume the payment of it. Hounson paid the interest for some three years, but did not pay the principal. Karr died and the demand was allowed against his estate.

In 1877 said defendant Isaac Hounson received conveyance of a farm of about one hundred and twenty-two acres in the township of Hudson in Lenawee county, and proceeded to occupy it as his homestead and carry it on, and some time thereafter and about the 20th of December of the same year he gave a deed of it, in which his wife joined, to their son, the defendant Alonzo Hounson.

In March, 1878, the complainant commenced a suit by attachment against the defendant Isaac on his undertaking of 1874 to pay the Burgess note, and the writ was levied on said farm, which was still occupied by said Isaac in the same manner as before his deed to his son. At the November term of the court for 1878 the administrator obtained judgment for damages, $580.47, besides costs, and in the succeeding February execution was taken out and levied on the farm.

This bill was filed not long after in aid of the execution. The farm as held by the judgment debtor was subject to a mortgage of $2000 and the defendant Alonzo after receiving the deed from him paid and discharged it.

After hearing the case on pleadings and proofs the circuit judge declared the premises liable to the execution after exempting the homestead. But the decree provided that the defendant Alonzo having discharged the mortgage

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of $2000, which stood on the whole premises and was a prior lien to the levy, he ought in equity in case of a sale of the premises or any part under the execution, to receive from the purchase price the same proportion of the $2000 which the purchase price of the part so sold would bear to the value of the portion set off as homestead. Both parties appealed.

The bill must be construed in reference to its nature. It is not filed to reach property incapable of seizure on execution, and therefore based on the theory that the legal remedy has been exhausted. Very far from it. The principle on which it proceeds is that a legal remedy is in fact progressing, and which being fraudulently obstructed, the aid of the Court is needed to remove that obstruction. The claim made is that the deed from the judgment debtor to his son is fraudulent as against the creditor, and that the farm is therefore subject to levy and the deed exposed to be removed out of the way of it by the assistant jurisdiction of equity.

Instead of setting forth the proper facts to induce the inference that the deed was fraudulent as against the complainant, the bill in general terms merely alleged the fraud itself. Hence it did not appear on the face of the bill in what way the deed was fraudulent as against complainant. But the defendants made no objection to this general mode of pleading and the defect is not open to exception on this appeal.

It is objected that defendant's insolvency is not alleged and not proved. The nature of the bill is not such as to make an allegation of that kind indispensable. As previously observed the office of the suit is to remove the debtor's deed out of the way of the execution and on the ground of its being fraudulent as against the creditor, and the equity for such interference may exist although the debtor is not insolvent. The circumstance of his being solvent or insolvent is important only as it bears upon the question whether in fact the deed is or is not fraudulent as against the creditor who has levied. Upon the matter of

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fact there is no doubt. The evidence is full to show that Isaac Hounson retained nothing liable to execution.

It is also objected that no allegation is made that the defendant had not sufficient personal property liable to execution in Lenawee county to pay the judgment; and no allegation that the officer made any effort to find it. Neither allegation was a necessary ingredient of the bill. If the officer neglected to make due search for goods and chattels on which to levy before levying on the land the question is not an open one here. The fault if any would have to be corrected in the court where the writ issued. The court of chancery is not the place. The presumption is that the sheriff obeyed the writ; and as stated previously, according to the evidence there was no personal property of the debtor exposed to levy.

The intent with which the deed was given is hardly open to controversy. The evidence of various kinds that the purpose was to screen the property from the demand of complainant and that both defendants participated in the design is too strong to be resisted. It appears conclusively from the bill and evidence that when the execution debtor gave the deed in question he held and occupied a homestead on the premises. That part of the farm was therefore exempt. The holder was as free to dispose of it without interference as though he had been not indebted at all. It passed by the deed to his son Alonzo and it is impossible for complainant to avoid the conveyance as in fraud of his rights. *Smith v. Rumsey* 33 Mich. 183. As against that parcel he had none. Therefore the equity of the bill fails in respect to that portion.

It is admitted that young Hounson paid the mortgage of $2000, and that this mortgage was a valid lien on the whole farm at the time his father gave him the deed, and of course anterior to the levy. The expenditure by young Hounson in making this payment relieved the property from the burden and practically increased the interest in the farm to an amount equal to the expenditure, and it seems right to regard this as raising an equity in his favor. The same doctrine

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which requires him to do equity entitles him to receive it. It is therefore just to provide as far as may be for protecting him against a forfeiture of the redemption money which it is admitted he paid. But he goes further and contends that in addition to the $2000, the principal of the mortgage, there should be included the sum of $380 on account of interest paid. The evidence on this topic is not satisfactory. The only proof consists of his oral statements, and the explanation is neither full nor certain. The fact must have been capable of clear and ample illustration, and the case called for it.

But there seems to be a want of equity in this claim. He strenuously insists that he has had the use of the entire premises during the whole period since the deed was given, and if truthful in this and the fact is as represented, it would seem that for the interest which grew on the principal of only $2000 he must have obtained an ample equivalent in this enjoyment of the property, and on the other hand it would be unreasonable to give him the benefit of an equity founded on the supposition of his having deliberately misrepresented in explaining his case to the court.

As the mortgage covered the exempt homestead as well as the residue it was entirely fair to require it to bear its due proportion of it. The benefit arising from the payment of the mortgage according to the proportion was equal between the homestead and the rest of the farm, and the principle that equality is equity applies. It would not be just to throw the whole burden on the part liable to execution and being that portion to which complainant is confined.

It is objected by defendants that the decree instead of making the *price* obtained by the sale on execution of the premises which may be sold, the criterion by which to get at the proportion to be allowed to the defendant Alonzo on account of the mortgage, it ought to make the *real value* of the part so sold, such criterion, and the reason given is that the price obtained on the sale under the execution may be far below the true value, and hence that the homestead may be compelled to bear an undue proportion. On considering

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this objection my brethren have concluded that the relief should be changed as here indicated. That the commissioners first set apart a parcel of the value of $1500 which shall include the dwelling and accompanying outbuildings. That they appraise the whole premises including the homestead and charge upon the homestead so much of the mortgage as is the proportion which $1500 bears to the value of the entire property. That they then set off a parcel of land of the value of so much of the mortgage money as is not charged on the homestead. The remaining lands are to be subject to sale on the execution free from all encumbrance.

The decree will be so far modified as to conform to this view and in other respects be affirmed. Neither party will recover costs of this court as against the other.

The other Justices concurred.

GEORGE L. PATCH, SHERIFF v. AARON WESSELS AND WILLIAM C. GARBUTT.

Attachment—Fixtures—Sheriff's possession—Bond for return of goods.

An attachment upon machinery bolted to the freehold is binding if the sheriff obtains full control of it, and he need not detach and remove it either to perfect his levy or to deliver possession on receipt of a forthcoming bond.

When a sheriff on receipt of a forthcoming bond has surrendered possession of attached property, he is not bound to secure the attachment debtor from interference with his possession by third parties.

Whether the sureties on a forthcoming bond in attachment, having recognized the possession of the sheriff, can dispute the recitals to that effect in the bond—*Q.*

Error to Gratiot. Submitted June 9. Decided June 15.

ASSUMPSIT. Plaintiff brings error. Reversed.

C. J. Willett and *J. K. Wright* for plaintiff in error. A sheriff levying on heavy machinery bolted to the freehold

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need not remove it in order to obtain possession: *Hatch v. Fowler* 28 Mich. 213.

S. J. Scott for defendant in error.

MARSTON, C. J. The plaintiff in error acting as sheriff, under and by virtue of an attachment against Lorenzo J. Bovee levied upon a "saw, pulley and belt or equalizing saw arbor." Some time afterwards the defendant therein, Bovee, executed and delivered a bond to the sheriff, signed by defendants herein as sureties. A judgment having been recovered in the attachment suit, and execution issued thereon, the sheriff made proper demand for the above property, but not receiving the same and being unable to find property of the defendant, the execution was by him returned unsatisfied. This action was then commenced against the sureties upon the bond.

The court charged the jury that the sheriff must have taken such possession or control of the property under the writ of attachment that he would have the right to take or remove it to any other place, and such possession or control he must under the law have given to defendant Bovee or his agents, upon his, the sheriff's, receipt of the bond; that Bovee or his agents should then have the same right to remove the property peaceably as the sheriff would have had if the bond were not given; that there being no testimony in the case tending to show that such a possession was given by the sheriff, a verdict of no cause of action should be returned.

From the evidence it appeared on the trial below, that the attachment debtor had put this property into the mill building, and under the charge of one Kingsley; that while in use it had been under Kingsley's control, but for some time previous to the seizure had not been in use. At the time the sheriff seized the property under his writ it was fastened to the building by bolts, and no attempt was then or afterwards made by the sheriff to remove the same. Third parties were in possession of the building but it does not appear that they were using or offered to use this property or interfere with the officer's claim thereto.

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I now quote from the record an account of what took place as to a delivery by the sheriff on receipt of the bond: "The counsel for the plaintiff further to maintain and prove the issue on his part, called George English who, being duly sworn, testified, that at the time of the seizure of the saw pully and belt under the writ of attachment, he was a resident of the village of Alma; that he was a deputy sheriff of said county; that the day after the property was taken he was placed by the sheriff in possession of the same at Pollasky's mill in Alma, and was in possession when the bond in question was given; that at that time he received from the sheriff an order to surrender his possession to Bovee; that one James A. Hough, an agent of Lorenzo J. Bovee, brought the sheriff's order; that he went to Pollasky's mill with Hough and Lewis A. Kelsey, another agent of Bovee; that he walked into the mill with Mr. Hough and up to the machinery in question and put his hand on it and said: 'There it is; I release all our claim on it; you take it;' and he, Hough, commenced to take it off the floor. I then stepped back towards the door. While Hough was at work on the machinery Simon Messenger came into the mill and forbade his removing the same. That afterwards Hough wanted me to remove the machinery from the mill but I told him one delivery was enough and did nothing more about the matter."

There was evidence corroborative of the above, and also evidence that efforts were made afterwards to remove the property by Hough, which was prevented by Messenger, Pollasky and perhaps others. This evidence tended to prove that the sheriff had by virtue of the writ of attachment seized and taken possession of the property in question, and although he did not remove the property, he placed his deputy in charge of it, so that it was certainly under his custody and control under the writ. He certainly was not bound, in order to make good or retain his levy, to detach and remove the property from the building or place in which he found it. The bond in question also recognized and recited the fact that the sheriff had by virtue of his

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writ seized and attached this property "and which the said George L. Patch now holds in his possession,"—so that the defendants in this case recognized the fact of the sheriff's levy and possession under his writ at the time they gave this bond, and it might now, were it material, admit of some doubt whether they could now deny the recitals in their bond.

We are also of opinion that this evidence tended to show a delivery of the property by the sheriff to the attachment debtor's agents. The sheriff certainly relinquished all his rights to the property, and the statutory bond having been delivered to him, he could no longer control the property. He could not then detach and remove the property from the mill, and he could not give others a right he himself did not possess. He surrendered to the defendant his possession, and the fact that immediately thereafter, or at some subsequent period, third parties, for whose acts the sheriff was in no way responsible prevented a removal of the property, would not render nugatory the bond he had received. The sheriff did have a possession that would have enabled him, if retained, to have sold this property under any execution afterwards issued in the attachment case, and this right he surrendered to Bovee's agents on receipt of the bond, and the sureties therein cannot now place him in any worse position than he occupied at the time the bond was given. The case should have been submitted to the jury under proper instructions and the judgment must therefore be reversed with costs and a new trial ordered.

The other Justices concurred.

HIRAM MAXFIELD v. SETH WILLEY ET AL.

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Payment of taxes by mortgagee—Bidding in mortgaged property at tax sale—Tax purchase by agents.

On foreclosure for non-payment of taxes as they fell due the mortgagee claimed to recover as taxes paid by himself, certain sums paid by his

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agent in bidding in the property at tax sales. *Held*, that such payments were not, in contemplation of law, payments of the taxes, and could not be included.

When a mortgagee instead of paying taxes due, purchases the land at a tax sale, the mortgager can treat the purchase as a payment and compel the cancellation of the tax certificate or deed on refunding the amount paid, with interest. But it cannot against his will be held a payment in his behalf.

Neither party to a mortgage can cut off the other's interest by bidding in the premises at a tax sale, if the other objects thereto.

A tax purchase by an agent in his own name but with his principal's money does not support a resulting trust in his principal's favor.

Appeal from Saginaw. Submitted June 9. Decided June 15.

Bill of foreclosure. Complainant appeals. Affirmed.

Hanchett & Stark for complainant. A mortgagee can pay the taxes and have the payment added to his claim: *Page v. Webster* 8 Mich. 263; *Horton v. Saunders* 13 Mich. 409; *Paine v. Avery* 21 Mich. 552; *Vaughn v. Nims* 36 Mich. 297; *Burr v. Veeder* 3 Wend. 412; *Kortright v. Cady* 23 Barb. 497; 1 Jones Mortg. §§ 77, 358; 2 id. §§ 1134, 1137, 1597.

Camp & Brooks for defendants. Purchase by a mortgagee at a tax sale is not a payment of taxes on the mortgaged property: 1 Jones Mortgages 672; *Jones v. Wells* 31 Mich. 174; *Williams v. Townsend* 31 N. Y. 411.

Cooley, J. This is a foreclosure suit. The mortgage is not disputed, nor the amount due upon the debt, and the controversy is narrowed to a question whether complainant is entitled to recover certain sums as payments upon taxes.

The mortgage was given by defendant Seth Willey: it bears date February 14, 1872, and was conditioned among other things for the payment by the mortgagor of all taxes and assessments that might have been or might be levied or assessed upon the mortgaged land. It was also provided therein that in case of non-payment of the debt and inter-

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est, or of the taxes assessed or levied on the land "as soon as the same have become due and payable," the mortgagee might foreclose and sell. The bill avers that the mortgagor did not pay the taxes for the years 1872 to 1878, both inclusive, and that complainant paid the same, and then proceeds as follows:

"Your orator further shows that he paid said taxes through his agent, Jerome K. Stevens, of Saginaw City, Mich.: that said Jerome K. Stevens was his agent for looking after and attending to the payment of taxes upon said premises, and taking care of your orator's interest in said premises under his said mortgage; that said Stevens for and in behalf of your orator, paid said taxes by bidding off said lands at the annual tax sales in October, 1875, for the taxes for the year 1872 for city taxes, and for the years 1872, 1873 and 1874 for State and county taxes, and by bidding off the lands at the annual tax sales in October, 1875, October, 1876, and October, 1877, October, 1878, for the State and county taxes for the years 1874, 1875, 1876 and 1877 respectively, and that he paid the city taxes upon said lands for 1873 and 1874, by purchasing leases of said lands from the city of East Saginaw upon the date aforesaid, which leases were made by said city of said lands, as delinquent for the city taxes levied thereon, in pursuance of its charter.

"Your orator further shows that his said agent made said bids and took said purchases in his own name, but for the use and benefit of your orator and for convenience merely, as your orator charges, and said Stevens so informed said defendant Willey at aoout the time of taking said bids and afterwards, and has always held the same subject to the orders of your orator, and for his protection, and your orator has been at all times willing to release and assign said certificates to said Willey, upon repayment to him of the amount paid by your orator therefor and interest, and hereby offers so to do.

"Your orator further shows that all of said payments, bids and purchases were made with your orator's money and for the protection of your orator's said mortgage interest, and for no other purpose, and not to obtain an independent title or to in any way, injure or oppress said defendant Willey. That the certificates of sale upon said bids, and the leases of said city are the receipts referred to by your orator in his allegation of the payment of said taxes, and the same now produced, proved and filed in this cause are referred to for greater certainty."

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It is proved in the case that Stevens made the purchases as alleged; that he was at the time agent for complainant and made use of complainant's money for the purpose with his assent, and that before purchasing he called upon defendant Willey and requested him to pay the taxes, which the latter refused to do, claiming that they were illegal and that he intended to contest them. It was also proved that Stevens was willing to surrender his certificates of purchase to Willey at any time.

The circuit court was of opinion that the purchases by Stevens were not in contemplation of law payments of the taxes by complainant, and refused to include the sums paid, in the decree for foreclosure. In this opinion we agree.

When the mortgagee, instead of making payment of the taxes, makes a purchase of the land at tax sale, either in his own name or in the name of any other person who has his money for the purpose, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid with interest. On this subject we need not repeat what was said in *Connecticut Mutual Life Ins. Co. v. Bulte* 45 Mich. 113. But the right to treat the purchase as a payment is the right of the mortgagor only, and rests upon a principle of equity that is necessary for his protection. Neither party to a mortgage can be suffered, against the will of the other, to buy at a tax sale and thereby cut off the other's interest. But either may bid, as a stranger to the title may, if the other makes no objection.

But in this case the mortgagor does not claim the purchase to be a payment, but repudiates it and asks no protection against it. The question now is whether it shall be held against his will to be a payment in his interest. The question, moreover, is complicated by the fact that the purchase was made not by complainant, but by another, and under circumstances which would have entitled the purchaser to retain the title as against complainant. Under our statute—Comp. L. § 4120—there is no resulting trust in such a case, and Stevens at his option would have deeded as

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complainant directed, or would have refused to do so. It is plain, then, that when first made the purchase constituted no payment, and if it can be deemed one at all, it must be because of the subsequent willingness to convey. This willingness might depend upon whether on investigation the tax title promised to be sustainable; but if it existed from the first it would be unavailable to complainant, for the party whose will was in question would in respect to the particular transaction be wholly beyond his control.

The case of *Jones v. Wells* 31 Mich. 170, is in point here, and is conclusive. When the mortgagee under such circumstances permits a third person to become purchaser at the tax sales he takes all risks—*First*, of the purchaser recognizing a resulting trust and conveying accordingly; and *second*, of the mortgagor being disposed to accept as a payment in his interest that which has assumed the form of a hostile purchase. The purchase cannot be forced upon the mortgagor if he chooses to leave it in the hands of the purchaser.

The decree must be affirmed with costs.

The other Justices concurred.

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ALBERT BURRILL v. AUDITOR GENERAL, COUNTY OF SAGINAW AND TOWNSHIP OF RICHLAND.

Bill to clear title from tax sale to the State.

A bill to quiet title as against sales to the State for unpaid taxes cannot be maintained as against the Auditor General unless the State consents to the suit and designates that officer to represent it as party defendant thereto.

Appeal from Saginaw. Submitted June 9. Decided June 15.

BILL to enjoin tax sale and vacate assessment. Complainant appeals. Dismissal affirmed.

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Wisner & Draper and *Michael Brennan* for complainant. A court can indirectly pass on the claims of the State where they are incidental to a suit against a State officer: *Osborn v. Bank* 9 Wheat. 738; *Mich. State Bank v. Hastings* 1 Doug. (Mich.) 225.

L. T. Durand and *Hanchett & Stark* for defendants. In purchasing at a tax sale the State holds as an individual: *Auditor General v. Supervisors* 36 Mich. 75; and though suit might be brought against the Auditor General to test the legality of a tax before sale (*Palmer v. Rich* 12 Mich. 414) it is practically a suit against the State, if brought afterwards, and cannot be maintained without the consent of the sovereignty: *Governor v. Madrazo* 1 Pet. 110; *Varick v. Smith* 5 Paige 136; *Briscoe v. Bank* 11 Pet. 321; *Beers v. Arkansas* 20 How. 527; *Kentucky v. Dennison* 24 How. 66; *Dodd v. Miller* 14 Ind. 433; *Auditor v. Davies* 2 Pike (Ark.) 494; *Ellis v. State* 4 Ind. 1; *State v. Trustees* 5 Ind. 77; *Delafield v. Illinois* 2 Hill 169; Adams' Equity 576; Dill. Mun. Corp. § 14; *Ambler v. Auditor General* 38 Mich. 746.

GRAVES, J. This case comes up on an appeal against a decree made in the circuit court in chancery for the county of Saginaw dismissing complainant's bill. The end sought by the cause is to quiet complainant's title as against the title obtained by the State under sales of the lands for several years for unpaid taxes. The objection which is insisted on against the title acquired by the State is that the assessor's certificate was in each year fatally defective.

The lands are vacant and the Auditor General is entirely passive, and in no event could he meddle with them except as authorized by law. The right the State holds in the lands is not subject to litigation in this way. The law has not commissioned the Auditor General to represent the State for any such purpose.

What is contemplated is to annul the title derived to the State through the tax proceedings, and the suit is virtually therefore against the State itself. But we fail to find that

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it has consented to be made a litigant in this manner in regard to any land to which it claims title.

This is not a case where tax proceedings are still going on and a claim is made that they are tainted with fraud, or that some officer has either acted in an unauthorized or illegal manner or is about doing so.

It is one where the proceedings have been allowed to culminate in sales to the State and where the tax title cannot be contested and set aside unless the State consents to become a litigant for the purpose of the controversy and points out the officer to be made a party. The State's title to any other vacant lands could with equal propriety be forced into controversy in chancery without its assent.

The want of jurisdiction is clear.

The decree is right and must be affirmed with costs.

The other Justices concurred.

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GEORGE P. SMITH v. HENRY C. POTTER, RECEIVER OF THE FLINT & PERE MARQUETTE RAILWAY CO.

Railway companies—Injury from negligence of fellow employes—Forwarding cars—Inspections—Judicial notice of mode of railway management.

A brakeman in coupling freight cars had his arm crushed by a loosened dead-wood on a car which had come from another road. It was the business of inspectors employed on both roads to see that cars transferred were in proper condition, and there was no claim or showing that they were not competent. *Held* that the inspector was a fellow servant of the brakeman and that the risk of error on his part was one of the risks of the brakeman's employment, and that the brakeman could not recover against the company for the injury.

Whether an action for a railway injury lies against the receiver of the company in whose employment it was incurred—*Q.*

The statutory requirement that every railroad shall impartially and diligently receive and forward the cars of other roads does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch.

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The court will take notice as part of the general knowledge of the business community that the railroads of the country conduct inspections under a system which all persons so employed as to be interested are presumed to understand.

Conductors and brakemen are fellow servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers.

Actions by employees against their employer for injuries caused by fellow servants are based on the actual negligence of the defendant or of some representative who is held in law to personate him; and where the business requires the employment of many servants beyond the possible constant supervision of either the employer or of such representative, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require.

When a master has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them.

Error to Saginaw. Submitted June 9–10. Decided June 15.

TRESPASS on the case. Plaintiff brings error. Affirmed.

Hanchett & Stark and *H. J. Hoyt* for plaintiff in error. Negligence is a question of fact, wherever the facts are in dispute, where different inferences may be drawn from undisputed facts: *D. & M. R. R. v. Van Steinburg* 17 Mich. 123; *Lake Superior Iron Co. v. Erickson* 39 Mich. 499; *Grand Rapids & Ind. R. R. v. Martin* 41 Mich. 667; *Swoboda v. Ward* 40 Mich. 420; *Billings v. Breinig* 45 Mich. 65; *Teipel v. Hilsendegen* 44 Mich. 461; *Gahagan v. B. & L. R. R.* 1 Allen 190; *Gavett v. M. & L. R. R.* 16 Gray 508; *Hough v. Railway Co.* 100 U. S. 224; *Hart v. H. R. Bridge Co.* 80 N. Y. 622; *Ernst v. H. R. R. R.* 35 N. Y. 38; *Railroad v. Stout* 17 Wal. 663; *Ireland v. O. H. & S. P. R. Co.* 13 N. Y. 533; *Wolfkiel v. Sixth Avenue Ry. Co.* 38 N. Y. 49; *Phil. C. P. R. Co. v. Hemice* 92 Penn St. 431: 9 Rep. 689; *Penn. R. R. Co. v. White* 88 Penn. St. 327: 8 Rep. 379; *Mauerman v. Siemerts* 71 Mo. 101: 10 Rep. 639; *Eaton v. Fitchburg R. R.* 129 Mass. 364: 11 Rep. 52; *C., C. & C. R. R. v. Crawford* 24 Ohio St. 639; *M. & C. R. R. v. Pickslay* id. 668; a railroad company is

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bound to furnish safe cars to its workmen and cannot escape responsibility in that regard by delegating the duty to an inspector: Cooley on Torts 557–563; Whart. Negligence §§ 210–212; *Chic. & N. W. Ry. v. Swett* 45 Ill. 203; *Chic. & N. W. Ry. v. Jackson* 55 Ill. 496; *Smith v. C., M. & St. P. R. R.* 42 Wis. 526; *Wedgwood v. Chic. & N. W. R. R.* 41 Wis. 478: 44 Wis. 44; *Drymala v. Thompson* 26 Minn. 40: 8 Rep. 50; *Lewis v. St. L. & I. M. R. R.* 59 Mo. 495; *Ford v. Fitchburg R. R.* 110 Mass. 260; *Snow v. Housatonic R. R.* 8 Allen 446; *Killea v. Faxon* 125 Mass. 487; *Booth v. B. & A. R. R.* 73 N. Y. 40; *Flike v. B. & A. R. R.* 53 N. Y. 549; *Fuller v. Jewett* 80 N. Y. 52; *Cone v. D., L. & W. R. R.* 81 N. Y. 206; *O'Donnell v. Allegheny Valley R. R.* 59 Penn. St. 248; *Patterson v. Pittsbury, etc., R. R.* 76 Penn. St. 389; *Shanny v. Androscoggin Mills* 66 Me. 420; *Hard v. Vt. & Canada R. R.* 32 Vt. 473; *Cumberland & Penn. R. R. v. State* 44 Md. 283: 45 Md. 229; *Nash. & Chat. R. R. v. Elliott* 1 Coldw. 611; *Braun v. C., R. I. & P. R. R.* 53 Ia. 595; *Hunt v. Chic. & N. W. R. R.* 26 Ia. 368; *Greenleaf v. Ill. Cent. R. R.* 29 Ia. 14; a distinction is made between the responsibility for the negligence of servants employed to procure safe machinery, and for that of servants employed to keep it in repair: *Searle v. Lindsay* 11 C. B. (N. S.) 428; *Clarke v. Holmes* 7 H. & N. 947; *Wilson v. Merry* 1 Scotch & Div. App. 326; the following cases hold that in the latter class of cases the employer is not responsible: *Columbus, etc., R. R. v. Arnold* 31 Ind. 174; *Railroad Co. v. Webb* 12 Ohio St. 475; *Wonder v. B. & O. R. R.* 32 Md. 417; *Harrison v. Railroad* 31 N. J. L. 293; and the following tend to support the same doctrine: *Mich. Cent. R. R. v. Austin* 40 Mich. 247; *Quincy Min. Co. v. Kitts* 42 Mich. 34; the master is responsible for the negligence of his servants in providing safe machinery for fellow-workmen: *Marq. & Ont. R. R. v. Taft* 28 Mich. 298; *Ft. W., J. & S. R. R. v. Gildersleeve* 33 Mich. 135; *Chic. & N. W. R. R. v. Bayfield* 37 Mich. 211.

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Wisner & Draper and *Wm. L. Webber* for defendant in error. A railroad company is not responsible to employees for injuries to them resulting from the negligence of fellow servants in the same general business: *Mich. Cent. R. R. v. Leahey* 10 Mich. 199; *Davis v. D. & M. R. R.* 20 Mich. 105; *Mich. Cent. R. R. v. Dolan* 32 Mich. 510; *Mich. Cent. R. R. v. Austin* 40 Mich. 247; *Quincy Mining Co. v. Kitts* 42 Mich. 34; *Farwell v. B & W. R. R.* 4 Met. 49; *Sherman v. Roch., etc. R. R.* 17 N. Y. 153; brakemen and car inspectors are fellow servants: *C. & A. R. R. v. Murphy* 53 Ill. 336; *Warner v. Erie R. R.* 39 N. Y. 470; *Coon v. Syracuse & Utica R. R.* 5 N. Y. 492; *Malone v. Hathaway* 64 N. Y. 5; *Wood v. New Bedford Coal Co.* 121 Mass. 252; *Gilman v. Eastern R. R.* 10 Allen 233; *Albro v. Agawam Canal Co.* 6 Cush. 75; *McAndrews v. Burns* 39 N. J. L. 117; *Valtez v. Ohio, etc., R. R. Co.* 85 Ill. 500; Shearm. & Redf. Neg. (ed. 1869) 101, 115, 124; the company must use every reasonable care in the proper construction of its road, in supplying it with necessary equipment and necessary material for repair, and in the selection of competent servants to supervise, inspect, repair and regulate the machinery, road and equipments, and regulate and control the operation of the road; and if these duties are performed by the management of the company and one of the persons so employed is negligent whereby another is injured, it is not the master's negligence and the company is not liable: *Priestley v. Fowler* 3 M. & W. 1; *Patterson v. Wallace* 1 McQueen 748; *Boyton v. Stewart* 2 McQueen 30; *Roberts v. Smith* 2 H. & N. 213; *Ormond v. Holland* El. Bl. & El. 102; *R. R. Co. v. Webb* 12 Ohio St. 475; if a servant who is injured through the unskillfulness of fellow servants or defective machinery or because the force of laborers is insufficient has the same knowledge or means of knowledge of these shortcomings as his employer, he cannot recover for the injury as he is held to have assumed the risks: *Frazier v. P. R. R.* 38 Penn. St. 104; *Wright v. N. Y. C. R. R.* 25 N. Y. 562; *Buzzell v. Laconia Mnfg. Co.* 48 Me. 113; *Mad River & Lake Erie Railroad v. Barber* 5 Ohio St. 541; *Mich. Cent. R. R. v. Smithson* 45 Mich. 212.

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CAMPBELL, J. Plaintiff, who was a brakeman on the railroad of which defendant was receiver, sues for an injury which he received by having an arm crushed while coupling cars. The accident is shown to have happened while plaintiff was attempting to couple two cars which had been brought loaded to Monroe by another road, and the occasion of it is said to have been the loosening and leaning down of the dead-woods of one car which was rather lower than the other, whereby as the two came together the dead-woods of the lower car went partially under those of the higher one and caught plaintiff's arm. The accident happened at night, when plaintiff's train was somewhat behind time and hurried. It appeared that at Monroe, as at other railroad junctions, the various roads had their own inspectors to examine cars brought in by or to be attached to their trains, and that this car was not reported as dangerous by either of the inspectors, of the road that brought it to Monroe or of the road on which plaintiff was employed.

The circuit court for the county of Saginaw, after hearing all the evidence, directed a verdict for defendant. No argument was made on the right to sue defendant as receiver, and the case has been treated as presenting no questions but those relating to negligence and its effect. And the only question under this head seems to be whether plaintiff as a person under employment can sue his employer, for the negligence of the persons who are claimed to have been in fault for not making a thorough inspection.

While there may be other matters that may be open to remark, we do not think that we can properly consider, as against the plaintiff, any other question.

The case has been very thoroughly presented, but after careful reflection we cannot see any principles involved in it which have not been so fully passed upon by our previous decisions as to render renewed discussion superfluous.

The statutes of this State make it the duty of every railroad to receive and forward cars of other roads impartially and diligently. This does not require the transfer of cars unfit for passage. But it does require that no unnecessary

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delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. It appears by this case, and we are bound to know as part of the general knowledge of the business community, that the railroads of the country conduct their inspections under a generally understood system which all persons so employed on the roads as to be interested are presumed to understand. It further appears that the road now in question employed the usual servants for that purpose, and there is nothing to indicate that there was any negligence in their employment or retention.

We cannot conceive any good reason for holding that the risk of occasional errors on the part of such persons is not one of those risks which naturally attend the shifting of cars from one road to another, and which consequently every brakeman or other person employed in handling them incurs as a part of his employment. There is no difference in the nature of the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical. Where a car has been damaged by some injury which has escaped notice, it cannot fairly be said that employers ignorant of it, who have taken all usual and reasonable precautions against it, are any more to blame in the one case than in the other. The duty of the inspectors passing the cars from road to road is of no different nature from that of other persons who have similar duties of vigilance. Conductors and brakemen have similar precautions to exercise in their respective callings, and the safety of such employees may be affected in numerous ways by neglect of careful scrutiny. They are in the strictest sense fellow servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers. When a brakeman handles any car, he knows there is at least a possibility that he may be injured, unless he examines it carefully. It may not always be legal negligence in him to rely with some assurance on the accuracy

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of the persons who should have examined it before it comes to him. But he is bound to know that omissions of such care are possible, and are dangerous if they occur. And he is also bound to know, as all men know, that it is impossible for employers to completely guard against it.

As we have frequently held, in accordance with what we conceive to be the legal rule, such actions as the present are based on actual negligence of the defendant sued or of some representative who is held in law to personate him. And in such a business as requires the employment of a multitude of persons beyond the possible constant supervision of either the ultimate or representative principal, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. When the principal has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them.

In the present case he appears beyond dispute to have done all this, and if the inspectors committed an error, or were guilty of negligence, he is not to blame for it. The work done is to be done at all hours and at every place where there are railroad connections with other roads. It is not a duty of management or general supervision but a task for which nothing is required but fidelity, and mechanical knowledge of a comparatively limited kind. It is such work as would seldom be delegated to an officer of extensive responsibility who has other interests to look after. But, whatever be its quality, it was in this case not claimed to have been placed in wrong hands. Nothing more could be asked of the employer.

The questions bearing on these duties and liabilities have been passed upon in several cases, which under different circumstances illustrate the same general rules. *Mich. Cent. R. R. Co. v. Leahey* 10 Mich. 199; *Davis v. D. & M. R. R. Co.* 20 Mich. 105; *Mich. Cent. R. R. Co. v. Dolan* 32 Mich. 510; *Fort Wayne J. & Sag. R. R. Co. v. Gildersleeve* 33 Mich. 133; *Botsford v. M. C. R. R. Co.* id. 256; *Chicago & N. W. Rw. Co. v. Bayfield* 37 Mich. 205; *G. R. &*

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I. R. R. Co. v. Huntley 38 Mich. 537; *M. C. R. R. Co. v. Austin* 40 Mich. 247; *Day v. Toledo, C. S. & D. Rw. Co.* 42 Mich. 523; *Quincy Mining Co. v. Kitts* id. 34; *Mich. Cent. R. R. Co. v. Smithson* 45 Mich. 212.

We do not think it necessary, in view of our own decisions, to review the cases elsewhere, which are not all consistent or harmonious. The court below undoubtedly relied on the rulings of our own reports, and there is no error in his decision.

The judgment must be affirmed with costs.

The other Justices concurred.

JAMES MCBRIDE ET AL. v. ACIEL F. WRIGHT ET AL.

Release of mortgage by cestuis que trustent.

A mortgage to secure the payment of certain judgments was given to a trustee for the benefit of different judgment creditors, each of whom already held separate mortgages on other property securing the same judgments. The holder of an interest in parcels covered by all these mortgages negotiated for a release and obtained one which purported to discharge from the earlier mortgage only, but which was evidently understood by all parties to release from the later one also. The creditors afterwards obtained an assignment from the trustee and sought to foreclose. *Held*, that a release by the *cestuis que trustent* was good in equity and discharged the later mortgage; that their bill should be dismissed, and that a cross-bill was not necessary for establishing a defence thereto.

Appeal from Gratiot. Submitted June 10. Decided June 15

FORECLOSURE. Complainants appeal. Dismissal affirmed.

Wheeler & McKnight for complainants.

Hanchett & Stark, T. W. Whitney, S. J. Scott, M. L. Anderson, C. J. Willett and *J. K. Wright* for defendants. Where an instrument intended to effect a release from a

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mortgage does not embody the agreement of the parties, its intent will be carried out: 1 Story Eq. Jur. (12th ed.) § 64 g; *Craig v. Leslie* 3 Wheat. 563:) and the real agreement can be shown; *Picard v. McCormick* 11 Mich. 68; *Rowe v. Wright* 12 Mich. 289; *Stacy v. Kemp* 97 Mass. 166; a mistake in the instrument may be shown by parol evidence in a suit to enforce it: 1 Greenl. Ev. § 296 a; Story Eq. Jur. § 161; *Garlinghouse v. Dixon* Walk. Ch. 440; *Chambers v. Livermore* 15 Mich. 389; *Berry v. Whitney* 40 Mich. 72; *Gillespie v. Moon* 2 Johns. Ch. 585; *Maher v. Hibernia Ins. Co.* 67 N. Y. 290; *Brick v. Brick* 98 U. S. 514; a release of a mortgage by a partner binds the firm: 2 Jones on Mortgages § 958; 1 Pars. Cont. 25; *People v. Keyser* 28 N. Y. 235; *Myrick v. Dame* 9 Cush. 255; *Hall v. Gray* 54 Me. 230; *Fitch v. Forman* 14 Johns. 172.

Cooley, J. The facts in this case are somewhat complicated, and as the questions involved are questions of fact, we shall content ourselves with stating conclusions.

On the second day of September, 1859, the copartnership of McBride Bros. of the city of New York had a judgment against Lewis M. Clark and Richard G. Hillyer for the sum of $670.10, and the copartnership of Archibald Young & Hoaglan had a like judgment for the sum of $1476.93. To secure the payment of these debts the creditors held separate mortgages on lands in Gratiot county. On the day above named the debtors executed to William L. Webber as trustee for the two copartnerships a third mortgage. The nominal consideration for this was $800, but it was conditioned for the payment of the two judgments. The complainants in this suit are the members or representatives of the two copartnerships named. The Webber mortgage covered blocks seven, eight and seventeen of the village of Pine River, which were embraced in neither of the other mortgages.

In January, 1866, the judgments remained unpaid, and Henry L. Holcomb, who had acquired an interest in the lands covered by the Webber mortgage, and also in certain

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parcels covered by the others, went to New York to negotiate for a release. He there saw the members of the two copartnerships, and agreed with them for a release of certain described lands, included in blocks seven, eight and seventeen above mentioned, for the sum of $700 which he paid.

Whether in the negotiations the Webber mortgage was mentioned is in dispute; but the release which was drawn, executed and delivered purported to discharge the lands from the other two mortgages only, and Holcomb testifies that he received it in that form on being assured that it was sufficient to release the lands from the Webber mortgage also. On the part of complainants the giving of any such assurance is denied; but we think the probabilities are that all parties at the time understood that the security the creditors had on blocks seven, eight and seventeen for the payment of their judgments was to be and was released. Unless it released from the Webber mortgage, the instrument executed was of course, so far as these blocks were concerned, wholly ineffectual.

In equity the release by the *cestuis que trustent* was a good release.

The Webber mortgage appears to have been mislaid soon after it was given, and nothing was done by any one in respect to it until 1878, when some person interested in a parcel of the land called upon Mr. Webber for a release of record. As the condition of the claim at that time was unknown to him, he addressed the complainants, and they, claiming it to be still undischarged, called for and obtained an assignment to themselves and instituted this suit. Our conclusion is, for the reason above stated, that the suit cannot be maintained. In equity the mortgage is discharged, and there is no necessity for a cross-bill to enable the defence to be made. The case of *Berry v. Whitney* 40 Mich. 65, is in point here and analogous in principle.

The circuit court having dismissed the bill, the decree will be affirmed with costs.

The other Justices concurred.

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In the matter of George W. Blue.

Board of supervisors—Power as to witnesses.

A board of supervisors has power to subpœna witnesses (Comp. L. § 469), but cannot arrest or commit them for contempt in refusing to appear.

Habeas corpus. This is an application for a writ of *habeas corpus* to obtain the release of the petitioner, who had been taken into custody by the sheriff of Wexford county under an attachment issued to that officer by the chairman of the board of supervisors. The attachment directed the sheriff to "attach" the said Blue and other persons therein named, and "bring them * * * forthwith before the board of supervisors * * * at the city council rooms in the city of Cadillac * * * to testify as to certain matters, said persons having been theretofore subpœnaed for that purpose and not having appeared." Motion submitted and disposed of June 21.

Jonathan G. Ramsdell for the writ.

Attorney General *Jacob J. Van Riper* against.

The court held that the board of supervisors had power to subpœna (Comp. Laws, § 469) but not to arrest or commit for contempt, and as the petitioner had already been released, farther proceedings under the writ would be unnecessary.

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The People v. Adam C. Arnold.

Conspiracy to cheat by false pretences—Ambiguous charges not cured by intendments—Formal conclusion to information—Merger of misdemeanor in felony—Personation of others—Admissions of confederates—Confessions.

An information for conspiracy need not allege the means to be employed unless they constitute the only element of criminality.

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An information for cheating and defrauding by false pretences must specify the pretences used; but an information for conspiracy thereto need not allege the means, and the offence may be complete even though the pretences or the victims are not agreed on.

An uncertain or ambiguous criminal charge cannot be supported by intendments.

An information for conspiracy need not allege an overt act in pursuance of it; and such an allegation, if made, does not aid a defective allegation of the conspiracy itself.

Where a conspiracy to obtain property by false pretences, has been carried into effect, an information therefor should state against whom the conspiracy was directed.

An information for conspiracy to obtain property by false pretences, should aver that the property belonged to some other person or persons than the conspirators.

The conclusion "against the form of the statute in such case made and provided" is mere surplusage, and does not determine that the information is for felony rather than a misdemeanor.

A misdemeanor is not merged in a felony in Michigan. Comp. L. § 7919. And where an information is filed for a misdemeanor, and a felony is shown, and the case is left with the jury, no farther prosecution for the misdemeanor can be had.

The misdemeanor of conspiring to obtain property by false pretences, may be tried wherever an overt act in pursuance of the conspiracy has been committed.

Where a conspiracy to defraud involves the personation of defendant by wearing his clothes, it is admissible to show that the defendant had proposed the scheme to a person not named in the information, but that it had actually been carried out by the confederate named.

A conspiracy may be shown by the detached acts and statements of the individual conspirators, and in a prosecution therefor the admissions of a confederate after the offence was committed are admissible to prove his own participation, the jury being cautioned not to permit his confessions to prejudice others.

There can be no conviction for conspiracy aside from the confessions of individuals, unless there is independent evidence of the participation of the different persons charged.

Exceptions before judgment from St. Joseph. Submitted April 27. Decided June 22.

INFORMATION for conspiracy to obtain money by false pretences. Respondent was found guilty. Verdict set aside and information ordered to be quashed.

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G. V. N. Lothrop for respondent. An information for conspiracy to obtain money by false pretences should allege that it is the money of some other person: *Reg v. Parker* 3 Q. B. 292.

Attorney General *Jacob J. Van Riper* for the people. The venue of conspiracy may be laid in any county in which any overt act in pursuance of it is done: *People v. Mather* 4 Wend. 259; Tiff. Crim. Law, 354; Whart. Crimes, § 2350; where a criminal act is done partly by one and completed by another, it is inferable that both are engaged in a conspiracy: Whart. Crimes, § 2355; *People v. Saunders* 25 Mich. 120.

Cooley, J. The information on which the defendant has been convicted alleged that he and other persons, at a time and place named, "unlawfully, deceitfully and fraudulently did combine, conspire, confederate and agree together, by divers false pretences, subtle means and devices to obtain and acquire to themselves the sum of, to wit nineteen hundred dollars of the value of nineteen hundred dollars, with intent to cheat and defraud." This is all the description we have of the conspiracy; but it is further averred that the conspirators "in pursuance of and according to said combination, conspiracy and agreement, between them as aforesaid, did, to wit, on the 16th day of March, 1880, at Sturgis in said county of St. Joseph, by diverse false pretences, subtle means and devices, unlawfully, falsely, deceitfully and fraudulently obtain and acquire to themselves of and from the First National Bank, a corporation created and existing under the laws of the United States, having its principal place of business at Sturgis in said county, and of the moneys, goods and chattels of said bank, fifty dollars in greenbacks and National Bank notes of the value of fifty dollars with intent to cheat and defraud."

It was objected on motion to quash that the information set forth no offence; but the court overruled the motion, and the case went to the jury on the facts. On exceptions the sufficiency of the information is now before us.

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It will be observed that the information only avers in general terms a conspiracy by divers false pretences, subtle means and devices to cheat and defraud, and that it does not set out and describe the pretences and devices, or more particularly indicate the means whereby the cheat was to be accomplished. Neither does it specify the person or persons who were the objects of the conspiracy, and who were to be cheated and defrauded in the prosecution thereof. It is conceded that if the act which the conspirators combine to perform is unlawful, it is not necessary to set out in the information the means intended to be employed in accomplishing it: *Rex v. Gill* 2 B. & Ald. 204; *Regina v. King* 7 Q. B. 782: *Sydserff v. Regina* 11 Q. B. 245; *Commonwealth v. Ward* 1 Mass. 473; *Commonwealth v. Warren* 6 Mass. 72; *State v. Buchanan* 5 Har. & J. 317; *Commonwealth v. McKisson* 8 S. & R. 420; *Twitchell v. Commonwealth* 9 Penn. St. 211; *Hazen v. Commonwealth* 23 Penn. St. 355; *State v. Bartlett* 30 Me, 132; *State v. Parker* 43 N. H. 83; *State v. Jones* 13 Iowa 269; *State v. De Witt* 2 Hill (S. C.) 282; *People v. Richards* 1 Mich. 216; *People v. Clark* 10 Mich. 310. But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out the unlawful means. *Commonwealth v. Eastman* 1 Cush. 189; *State v. Noyes* 25 Vt. 415; *Alderman v. People* 4 Mich. 414; *People v. Clark* 10 Mich. 310.

To cheat and defraud by false pretences a person named is an indictable offence by statute. In an information for this offence it would be necessary to specify the pretences used; but in an information for conspiracy to cheat and defraud by false pretences the like particularity is not essential. It is enough to allege in general terms the combination and agreement to commit the crime; *State v. Crowley* 41 Wis. 271; and the offense of conspiracy may be complete even though the pretences for accomplishing it may not be agreed upon. *People v. Clark* 10 Mich. 310. It may also be complete although no particular persons were in view as

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subjects of the fraud, if a definite purpose to defraud appears. The conspiracy for which conviction was had in *Rex v. De Berenger* 3 M. & S. 67, was alleged to be a conspiracy to defraud such subjects of the king as should make purchases in the public funds when the price should be artificially advanced by false statements and unfounded rumors. See also *Regina v. Peck* 9 A. & E. 686. In *Clary v. Commonwealth* 4 Penn. St. 210, the indictment, which was held good, charged a conspiracy by the circulation of false and forged bills to cheat and defraud "the citizens of this commonwealth and others." In *Commonwealth v. Judd* 2 Mass. 329, the conspiracy was to manufacture base and spurious indigo and sell the same at public auction, with intent to cheat and defraud such persons as should become purchasers. It is necessary to permit this general form of pleading, or some of the worst and most mischievous conspiracies would escape punishment altogether, from the obvious impossibility of making the indictment specific when the purpose to defraud was general.

Now it is highly probable that in this case Arnold and his associates did not in their combination fix definitely upon any persons who should be the victims of their criminal artifices. They planned frauds and agreed in a general way upon the means whereby they were to be accomplished, but circumstances must determine who should be defrauded. It would have been allowable, therefore, to charge that they conspired, by divers false pretences and tokens to cheat and defraud; making use, for that purpose, of terms as general as those employed in the cases above referred to. A better method no doubt would have been, when the fraud had been actually accomplished, to allege a conspiracy to cheat and defraud the bank which was actually defrauded, for the overt act had then made specific and certain what before was general and uncertain.

But in this case the allegation is that the associates conspired to obtain and acquire to themselves a certain sum of money with intent to cheat and defraud. It is not alleged that the purpose was to cheat and defraud any one person or

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class of persons, or the public generally. As stated, the conspirators had in mind a purpose to cheat; but this was an incomplete purpose unless it contemplated being carried out by the selection of persons as victims. They also had in mind to acquire to themselves a certain sum of money; but it is not alleged that this money belonged to any other person or persons, or that they conspired by their false pretences and devices to deprive any other person or persons of his or their money or other property. It would be perfectly conceivable—if the information contained no further allegation respecting it—that the money they proposed to acquire to themselves was their own money which some one else was wrongfully witholding from them, and which by deception they proposed to reclaim. Nothing can be intended in favor of an uncertain or ambiguous criminal charge.

But in this case an overt act is alleged to have been done in pursuance of the conspiracy; and this overt act was the obtaining by false pretences of the sum of fifty dollars of the First National Bank of Sturgis, of the goods and chattels of that bank. Had the information alleged that the conspiracy contemplated this particular fraud it would have been sufficient; but the question now is whether the allegation that this criminal act was done in pursuance of the conspiracy is sufficient to supply the defect in setting out the conspiracy itself.

If it were essential in these cases to allege and prove an overt act, the question would be of easy solution; but, as already stated, this is not needful, for the crime charged is the conspiracy, and that requires no overt act whatever to render it complete. *Regina v. Best* 2 Ld. Raym. 1167; *State v. Burnham* 15 N. H. 396; *Commonwealth v. Gillespie* 7 S. & R. 469; *People v. Clark* 10 Mich. 310. The proof of an overt act may be important for the bearing it may have upon the evidences of conspiracy, and also as it may aid the court in justly graduating the punishment in case of conviction. Alleging and proving it, therefore, is much like alleging and proving matter of aggravation in other cases.

But whether the allegation of an overt act may aid a

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defective charge of conspiracy when the allegation itself is unnecessary, and if defective might be treated as surplusage, is a point not readily settled upon the authorities. Personally I should be inclined to follow *Rex v. Spragg* Burr. 993, in which the point was decided in the affirmative; but the authority of that case is unquestionably somewhat shaken by what is said in *King v. Regina* 7 Q. B. 795, 809, and by later cases, and my brethren are not disposed to follow it. In their opinion the information in this case is fatally defective, and should have been quashed.

It is not very essential, perhaps, that anything should be said at this time upon the other questions made by the record, but as it is not likely the case will be allowed to rest upon a failure because of defective papers, and the questions now made may be raised upon a new trial upon a better information, it may be well to express an opinion upon them.

It was contended that as the information showed a felony committed, the common-law misdemeanor was merged therein and could not now be punished. This raises a question over which there has been much controversy; but it is no longer of importance in this State because the statute has rendered it immaterial. The statute provides that "If, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not, by reason thereof, be entitled to an acquittal of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court, before which the trial shall be had, shall discharge the jury from giving any verdict upon such trial, and shall direct such person to be indicted for felony." Comp. L. § 7919.

The information in this case was for the misdemeanor only. It alleged in general terms that the crime of false pretences had been committed, but it did not set out the pretences, and therefore would have been insufficient as a charge for the felony. *State v. Crowley* 41 Wis. 271. It was good as a charge of misdemeanor, because by a long course of decision more generality of allegation has been permitted in making that charge. The information con-

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cluded *contra formam statuti*, but that was mere surplusage. *Commonwealth v. Hoxey* 16 Mass. 385; *State v. Buckman* 8 N. H. 203. No one pretends that there has been any attempt here to put this defendant on trial for anything else than the conspiracy. When therefore the prosecution showed the commission of a felony, the case was presented which the statute contemplates, and when the judge permitted the case to go to the jury, he determined finally the question now made. It was the purpose of the statute to preclude the merger in such a case, and to settle forever the troublesome questions which had before existed on that subject.

It is also objected that the defendant was informed against and tried in the county of St. Joseph while the conspiracy is alleged to have been formed in Calhoun; so that the defendant has been deprived of his right to a trial by a jury of the vicinage. But the overt act was committed in St. Joseph; and according to the common-law precedents the misdemeanor may be tried wherever an overt act in pursuance of the conspiracy takes place. If a man at one end of the State conspires with others to defraud a person at the other extreme, and the fraud is actually committed, the question of hardship as between him and the prosecutor in requiring the trial for the conspiracy to be had at the place of residence of the one rather than at that of the other, presents considerations which obviously are not at all in favor of the accused. But the rule is clear and no doubt has been wisely settled. *The King v. Brisac* 4 East 164.

It was further contended that the conspiracy set out in the information was not proved, but the evidence tended to show one that was different.

The conspiracy alleged was one between Adam C. Arnold, John Snediker and other persons unknown. As developed in the evidence, the conspiracy contemplated that John Snediker should dress himself to represent Arnold, take certain bank drafts owned by Arnold and payable to his order, negotiate and indorse them in Arnold's name, divide

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the avails with Arnold, and that then Arnold should stop payment and demand and obtain new drafts instead.

The drafts were dated in December, 1879. One of them was negotiated at the First National Bank of Sturgis by John Snediker, March 16, 1880. There was abundant evidence in admissions made by him that he took and negotiated this draft in pursuance of the conspiracy, and that he had other drafts to the amount of $1850 for the same purpose. The case against Arnold was, for the most part, circumstantial, but the prosecution was allowed to prove a conversation between him and one Samuel Snediker, which took place in the latter part of February, 1880, in which, as the witnesses testified, Arnold made the distinct proposition that Samuel Snediker should take the drafts and go off and negotiate them precisely as John Snediker afterwards did, and that Arnold should subsequently collect the amount. This evidence was objected to as tending to show a conspiracy between Arnold and Samuel Snediker, with which John Snediker was not connected. I do not understand however, that the prosecution made any claim that this evidence showed a conspiracy. It showed criminal advances by Arnold to Samuel Snediker, but no acceptance, and there was no other evidence which in any way connected Samuel Snediker with the alleged offence. The evidence was therefore inadmissible unless it was relevant to the charge of conspiracy with John Snediker. But I think it was relevant. It tended to show that Arnold, but a few days before John Snediker had personated him in the sale of one of his drafts, wearing for the purpose his clothes, watch and spectacles, had proposed the same thing to another person, and endeavored to entice him into a conspiracy to do precisely what was afterwards done by John Snediker. Now if one man proposes to a second the commission of a crime, and it is found afterwards to have been committed by a third, its commission raises but a feeble presumption, if any, that the first proposee was in any manner connected with it. But this case is peculiar. The crime proposed involved the personation of the defendant, and the possession of some of his

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property. The preparation for it necessarily required either the connivance of the defendant, or the commission of a crime upon him to obtain possession of the means of committing the offence alleged. It is not therefore the naked case of the commission of a crime by one person which had been previously suggested to another, but it was the case of a crime committed with the means which must have come from the person by whom the crime was suggested. It is true that he may have been robbed of these, instead of furnishing them voluntarily, but it is so improbable it should occur to John Snediker, independently of any previous suggestion, to commit the offence in precisely the way Arnold had before proposed to another person, and that he should commit another and higher offence in order to obtain the proposed means, that a jury would be quite warranted in believing there was something more in the case than a mere coincidence.

It is further urged that the court erred in receiving in evidence the admissions of John Snediker. These were admissions of a joint offence, made after its commission, and from their nature, it is said, could not be received against Snediker alone. But the fact that the offence is joint cannot exclude admissions. They are admissible against the party making them, and the court must protect the other by cautioning the jury not to permit the confession of his alleged associate to prejudice him. If the participation of the other is not made out by independent evidence, there can be no conviction; but the existence of a conspiracy must commonly be made out by the detached acts and statements of the individual conspirators.

For the defect in the information which has been pointed out, it must be certified to the circuit court that the verdict should be set aside, and the information quashed.

MARSTON, C. J. and CAMPBELL, J. concurred.

GRAVES, J. took no part in the decision.

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Andrew C. Maxwell v. The Bay City Bridge Company.

Injury to riparian property by proximity of bridge—Estoppel from claiming damages—Effect of legalizing statute upon existing right of action.

A dock owner whose property is injured by the proximity of a bridge, is not estopped from claiming damages by the mere fact that his grantor had petitioned for the bridge, if the bridge company's action was not determined by the acts of the grantor.

The testimony of a witness as produced on direct and cross examination must be taken altogether.

An estoppel is not established if the evidence fails as to any essential element of it, but if there is more than a scintilla of evidence to establish it, the court will not inquire into its weight.

Where the Legislature legalizes rates of toll fixed by a board of supervisors for the use of a bridge previously erected without authority of law, the action of the two bodies precludes any question of the legality of the bridge thereafter.

An existing claim for damages arising from the establishment of an unauthorized bridge is not cut off by the action of the Legislature and the supervisors in merely recognizing the bridge as lawful, though no such claim can arise after their action.

Statutes do not operate retrospectively unless their language clearly shows that the Legislature meant them to.

The State cannot interfere with a riparian's profitable enjoyment of the shore without compensating him.

Whether the State can so legalize a bridge as to cut off pre-existing claims for injuries resulting from its maintenance—Q.

In an action for damages to a dock-owner resulting from the construction of a bridge near by which tended to prevent vessels from stopping at the dock, it is admissible for the plaintiff, after showing such interference, to give a general estimate of the annual damage caused him thereby; the defence can cross-examine him as to the particulars upon which the estimate was formed, and the weight of the evidence is for the jury, who should take it in connection with other facts in evidence.

In an action for actual damages the defendant's good faith has no bearing.

In an action for damages to property caused by neighboring structures, the fact that plaintiff has offered to lease part of the property to defendant has no proper bearing in the case.

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Error to Bay. Submitted June 10. Decided June 22.

TRESPASS on the case. Plaintiff brings error. Reversed.

Hanchett & Stark and *Samuel Maxwell* for plaintiff in error. In an action for damages the weight of plaintiff's estimate of his damages is solely for a jury, if it is competent evidence: *Perrott v. Shearer* 17 Mich. 54; *Watkins v. Wallace* 19 Mich. 77; *Blackwood v. Brown* 32 Mich. 107; the owner of property injured by a neighboring structure is not estopped by the conduct of his grantor in permitting it to be erected, if it was built without reference to the grantor's conduct: Bigelow on Estoppel 473, 480, 560; Herman on Estoppel §§ 410, 411, 422; *Cronin v. Gore* 38 Mich. 385; *Howard v. Hudson* 2 El. & Bl. 1; *Copeland v. Copeland* 28 Me. 540; *Titus v. Morse* 40 Me. 352; *Otis v. Sill* 8 Barb. 108; *Welland Canal v. Hathaway* 8 Wend. 482; *Andrews v. Lyons* 11 Allen 349; *Turner v. Coffin* 12 Allen 401; *Boggs v. Merced Mining Co.* 14 Cal. 279; *Brant v. Virginia Coal Co.* 93 U. S. 326; *Smith v. Newton* 38 Ill. 236; *Zuchtmann v. Roberts* 109 Mass. 53; *Wineyar v. Fowler* 82 N. Y. 315; *McMaster v. Ins. Co.* 55 N. Y. 229.

Holmes, Collins & Stoddard for defendant in error. The action of a Board of Supervisors in legalizing the rates of toll on a bridge built without authority, and of the Legislature confirming it, is enough to legalize the bridge from the date of its establishment: *People v. Maynard* 15 Mich. 471; *People v. Supervisors* 20 Mich. 95; *Attorney General v. Lothrop* 24 Mich. 235; *Pennsylvania v. Wheeling Bridge* 18 How. 421; *Clinton Bridge* 10 Wall. 454; *Kanawha v. Kanawha Coal Co.* 7 Blatchf. 391; *State v. Mississippi R. R. Co.* 20 Ark. 495; *Truckee v. Tahoe Turnpike Co.* 44 Cal. 89; *People v. Farnham* 35 Ill. 562; *Basshor v. Dressel* 34 Md. 503; *Atlantic &c. R. R. Co. v. St. Louis* 66 Mo. 228; *Black River &c., R. R. Co. v. Barnard* 31 Barb. 258; *People v. President* 9 Wend. 380; *White v. Ross* 4 Abb. App. Dec. 589; *Smith v. Harkins* 3 Iredell (N. C. Eq.) 613; *State v. Fourth N. H. Turnp.* 15 N. H.

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162; *Trustees v. Zanesville* 9 Ohio 203; Cooley's Const. Lim. (4th ed.) 463, 471, 460–479; no private individual can complain of incidental damages occasioned by what the State has authorized: *Larkin v. County of Saginaw* 11 Mich. 88; *Maxwell v. Bridge Company* 41 Mich. 468; *Transportation Co. v. Chicago* 99 U. S. 645; *Chope v. D. & H. P. R. Co.* 37 Mich. 199; Cooley's Con. Lim. (4th ed.) pp. 481–487; the grantee of one who has licensed the building of a bridge abutting on his premises is estopped from claiming damages for injury resulting from its proximity to his property: *Swartz v. Swartz* 4 Penn. St. 353; *Cumberland Railroad v. McLanahan* 59 Penn. St. 23; *Sheffield v. Collier* 3 Kelley 82; *Cook v. Pridgen* 45 Geo. 331; *Lane v. Miller* 27 Ind. 534; *Russell v. Hubbard* 59 Ill. 335; *Wilson v. Chalfant* 15 Ohio 248; *Brown v. Bowen* 30 N. Y. 519; *Lee v. McLeod* 12 Nev. 280; *Beatty v. Gregory* 17 Iowa 114; *Raritan Water Co. v. Veghte* 21 N. J. Eq. 463; *Rhodes v. Otis* 33 Ala. 578; *Wynn v. Garland* 19 Ark. 23; *Richmond & Lex. Turnp. Co. v. Rogers* 1 Duvall (Ky.) 135; *Commissioners v. Withers* 29 Miss. 21; *Motz v. Detroit* 18 Mich. 495; *People v. Com. Council* 65 Barb. 10; *People v. Murray* 5 Hill 468; *Baker v. Braman* 6 Hill 47; *Embury v. Conner* 3 N. Y. 511; *Houston v. Wheeler* 52 N. Y. 641; *Burlington v. Gilbert* 31 Iowa 356; 7 Amer. 143; *Bidwell v. Pittsburgh* 85 Penn. St. 412: 27 Amer. 662; what one consents to and invites he cannot in law complain of as an injury: *Marq., Hought. & Ont. R. R. v. Spear* 44 Mich. 769; *Motz v. Detroit* 18 Mich. 495; one may waive by parol a constitutional provision for his benefit: Sedgwick Const. L. (2d ed.) 88; Cooley's Con. Lim. (4th ed.) 219; *People v. Murray* 5 Hill 468; *Baker v. Braman* 6 Hill 47; *Embury v. Conner* 3 N. Y. 511; *Houston v. Wheeler* 52 N. Y. 641; *Buel v. Trustees of Lockport* 3 N. Y. 197.

Marston, C. J. This case has been before in this court, and is found reported in 41 Mich. 453, to which reference is made for a statement of the facts and a diagram, showing the location of the bridge, swing, property of the plaintiff, etc.

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Two questions of primary importance have, with others, been argued and submitted in the present case, and these were not passed upon on the former hearing:

First, Did the evidence introduced tend to prove an estoppel as against the plaintiff or his grantor Hart, so that damages could not now be recovered against the company? and,

Secondly, Did the action of the supervisors in 1874, in fixing rates of toll for the bridge company to charge and collect, and of the Legislature in 1875 legalizing the rates so fixed, legalize the bridge, and make it a lawful structure not only from the date when such act took effect, but from the time the bridge was established by the board of supervisors in May, 1864, as claimed by counsel for the bridge company?

The testimony of Mr. Glasby, who built the bridge, was one of the principal stockholders, and who testifies fully as to what Mr. Hart the plaintiff's grantor said and did in reference to the location and construction of the bridge and swing is given in a note herewith,* and there is no other

* *William F. Glasby*, sworn for the defendant, testified as follows: I reside in East Saginaw; have lived there since 1850. I am a contractor and builder. I built the bridge for the Bay City Bridge Company. I built the most of it in 1864. I owned about or very nearly one-half of the stock. I knew when the company was organized and the preliminary arrangements for locating and building the bridge. I knew Julius B. Hart; he had a store just north of the street where we were building the bridge at that time. I think it was the second store—a warehouse and store together. His was the second block; Park & McDowell had a liquor establishment in the first block. I believe I was acquainted with Mr. Hart before the bridge company was organized. When we were ready to locate the bridge I talked it over with all those interested in the neighborhood of the bridge, and Mr. Hart was among the rest, and I had a number of talks with him as to where he would like to have it located to suit him, with others.. He seemed to want the location of the bridge there on Third street, where it was finally located. He was more active than other parties living right around there. He had nothing against it, but requested if there was any such thing he wanted it located there. He would be satisfied to have the bridge there, and wanted it there; that was his point for it. [Witness was shown a paper, being the petition of Hart and others herein set forth.] I recollect of there being a petition got up by the parties there which was requested by us bridge men to put before the board of supervisors and have their sanction in the thing as much as possible. I would not say how many times Mr. Hart and I talked over the matter, but did so every little while. There was some of them around every day talking it over. I could not tell you whether it was talked over five times or twenty times. We talked it

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testimony in the case tending, more strongly than this, to show acts or conduct of Hart, or reliance thereon by the company, that would estop the plaintiff in this case.

In speaking of an estoppel, when this case was before considered it was said the doctrine of estoppel rests upon a party having directly or indirectly made assertions, promises or assurances upon which another has acted, under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved or the promises or assurances to be withdrawn; and as the doctrine when applied operates to take away legal rights it is no more than common justice to require that the facts which are supposed to call for its application shall be unquestionable, and the wrong which is to be prevented be undoubted. The correctness and indeed the justice of the rule as thus laid down will be unquestioned, sustained as it is by an almost unbroken line of authorities. What is there in the evidence to bring this case within the rule thus laid down?

The testimony of Mr. Glasby, when taken together, and this is the only way to test it, shows conclusively, that in no

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over a number of different times. During the time I was building the bridge I had a little office over Mr. Hart's store part of the time, and part over in the next block below on this side of the street. Captain Averill I think his name was. I saw Hart around frequently while we were building the bridge every day or every day or so, and I could not say how often.

Question. After the resolution had passed locating the bridge or giving the consent to the building of it, state what you did and who assisted you in making the actual locations and butments of the piers and swing?

Answer. The way I would explain that would be this: I wanted to locate the bridge so it would be satisfactory to the people here as much as possible, and I didn't care myself where it would be particularly, only to suit everybody. All I can say in regard to Mr. Hart, his desire was to have the bridge located on Third street and no other place. I recollect something about the morning we went to drive the first spile. I drove in the bridge proper through the channel of the river. I drove the spile in the center of the swing as near as I could get at it, and it was talked over that I was going to locate the swing, and there was different parties there to look on to see how it would look, how far out, and so on. I told them how far out I wanted it, and they didn't seem to know until they could see a spile drove. There was all the neighbors, Mr. Hart and all of them there looking on, and they made up their minds that it would be about right. Mr. Hart was with the rest, and there was no objections, and said it would be about right. As near as I can recollect there was no objections at all from anybody. I would say in regard to the location, I believe it as I supposed to be just about right for the use of the bridge, and the working of vessels and so

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way was his conduct—and he then and for this purpose was the company—influenced or affected by the acts, conduct or language of Mr. Hart, different from what it would have been had Mr. Hart not been an actor or interested in the question at all. Mr. Glasby says clearly and distinctly that it was to the board of supervisors he looked and depended for his authority in the premises, in all that he did; that if his actions and doings pleased Hart, he (Glasby) was glad, but beyond this Hart's acts and conduct had no influence with him. It is clear beyond dispute from the evidence,

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on through the bridge to be handy, the location of the dock at the time of it, we had to build a bridge about that shape to be so that it would not be knocked down right off. The swing of the bridge has to be about so far from the dock to be handy, and if it is too close it is in danger. I measured the depth of the water across the river, and then I talked it over with different parties here that knew all about the vessel business and the current up and down the river here, and where there was a bar up above by Mr. Lord's mill as it used to be then. There was a bar out around there, and I wanted to get the channel as near as I could so as to have the long pier in the middle of the river with the channel of the river. I talked it over with different parties and put it to the best of my judgment of what I could make it by measuring the water above and below; in doing that I located it where it is. That was the best place I thought, or I should not have put it there. I am positive Mr. Hart was present when we drove the first spile, because all those were there that were interested. I drove the first as near as I could get at it, measuring from the shore to the center of the swing, as near the bridge line as I could. I drove the spile as near the center as I could, and from that spile I got my exact center; from that spile I struck out my stakes. I could not tell anything about how often Mr. Hart was around consulting with me while I was constructing the swing pier: it was frequently talked over with every one that came along. I could not say how many times I talked with Mr. Hart, nor anything about it. I did a number of times. We did all our shipping there, and I saw him very often; was in the store, and did a great deal of business with him. He had a shipping warehouse for steamboats, and all our iron we had came up and landed at his dock, and was unloaded there. We paid him, and he collected the bills that we paid him. I would say as to the influence of the thing in locating the swing pier, swing and abutments of the bridge where they are, I don't know as Hart had any great influence no more than general good will. I wanted every one to be satisfied, and he was perfectly satisfied with it, and had no objections to make, and seemed to be pleased when he talked it over. He, nor no other man that I know of, never expressed a word of objections or dissent to it. I don't know as his power, actions, requests and acts had any bad influence on us in relation to constructing the bridge and the expenditure of our money and nothing against it at all. I don't know as there was any great influence, no more than I was pleased to have him satisfied with it. It seemed to be his wish.

Question. Will you please state whether Mr. Hart was in a position where he saw the bridge during its construction?

Objected to by Mr. Hanchett. Objection overruled, and plaintiff excepted.

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that aside from Hart's signature to the petition presented the board of supervisors asking that the bridge be located at the foot of Third street, he neither did any act nor said anything, which changed or influenced the conduct of the company, or upon which action was taken by it different from what it otherwise would have been, so that we are unable to see how it can now be said that the company relying upon what he said or did, expended any money or did anything, which justice and equity requires them to be protected in the full enjoyment of, as against Hart or his grantees. The

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Answer. Yes, sir; he was where he could see it every day, and his store was right in plain view. I presume he was attending to his own business at the store. He was there, and I saw him around. I could not tell how often I did see him during the progress of the work; I might have seen him once a day, and I might have seen him 20 times a day, and might not see him once in a week. I didn't notice whether he was there every day or not. His position was where he could see me a dozen times a day, just as well as not, if he was at home. I cannot say whether he was there every day or not. He might have been out of town a day or so, and I not know it. He was there generally just as much as any other man doing business in his own store. I would see him very often. There was, never a word of complaint in the world in no way, shape, or manner from him. He didn't disapprove of it in any way, shape, or manner; that is all he could do about it. I didn't ask him to help me, or any such thing. I could not tell the date of the application to the board of supervisors, yet I remember the whole transaction. I had a little sketch of the plan of the bridge, something of what I was going to build. I had a plan something like the manner of the construction of the bridge. I have got the most of that plan. I have got the plan just as we built it, with the exception of from the swing this way. I cut off that part of it, and used it in another draft and I have not got that 50 feet of the light trestle-work that was on this side; I used it up. [Witness produces the plan.] This was the plan that I presented to the board of supervisors. It shows a part of the swing that we built there, but it don't show so that you can tell from the shore, on account of the first 50 feet being cut off. There was 50 feet of trestle-work, running from the end of the swing to the dock, that I cut off and used in another place. This place represents the end of the swing. There was a 50-foot span just exactly like this other 50-foot span run to the dock. He saw that, and we showed it to every one. Mr. Hart saw it a number of times. The bridge was built after this plan—exactly like it. It was either that or tracing of it that was before the board of supervisors when the petition was presented; if it was not that identical paper, it was a tracing of it. I mean we traced it off on tracing cloth, a copy of it. There was no other draft of it ever got up, and that is exactly the way we built the bridge. This plan indicates what parts are wood and what parts are iron.

The draft offered and received in evidence, and marked exhibit "C."

Question. [Showing witness paper, being the notice attached to the petition.] Will you look at that notice?

Answer. I have seen that notice lots of times. I think I posted that notice. I done it myself, individually, because I wanted it done to suit me, and I done it the whole length of the Saginaw river, from Salina to the lake. I cannot tell the exact stump or house where I posted them.

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essential elements required by the doctrine of estoppel in order to apply it are wholly wanting in the present case. Were this simply a question as to the weight of the testimony, within the rule laid down in *Conely v. McDonald* 40 Mich. 150, and since adhered to, we should not interfere, but in our opinion the evidence failed in essential particulars to establish an estoppel, or facts which would warrant a jury in so finding.

Upon the second question we are of opinion that the acts of the supervisors and of the Legislature in fixing and legal-

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I knew what the law required in regard to the number of towns that notices must be posted in, and I knew the towns then and looked them all over, and went and did it myself to have it correct. I could not tell the exact house or stump where I posted them. I can explain what knowledge I had of what I had to do, and what means I took of ascertaining what had to be done on posting the notices in this way. I helped to get up the charter of the East Town bridge; two charters up to East Town, and I knew what I would have to do, because when I got up those others I looked it all over, and I knew; and I came down here knowing just what I had to do a year before. [Witness was shown statute to refresh his memory.] The law required so many days, and I testified that I posted them in the required time. I was very particular about that. It wanted three weeks, and I say I did it four or five weeks before. I won't say it was three days over, but I was particular having it right. I don't recollect the particular places in each town. They were posted up in just as public places as I could find. But I could tell the greater part of them where I put them up. It was over three weeks. I will testify to that sure, because I am positive about it. It is a pretty hard thing to tell the exact place I posted them at, around town here. I know I had one stuck up near the Barclay house here—I forgot whether it was on the house or exactly the spot; and I stuck up one on the old Stephens store up there; and up at East Town I stuck up some there, in the town, in the most public places I could think of—anywhere it came handy. I remember of going to Salina, and putting them up there, and over to Saginaw City. I could not tell all where I put them, only I know I kept up the required amount, and I done it in time. I would swear to that anywheres. At that time I knew exactly the different townships, but I could not tell now. I posted notices in each of the townships on the Saginaw river—I was particular about that. It was more than three weeks prior to the meeting. I don't know whether Mr. Hart was present or not at the meeting of the board of supervisors at the time this question came up. I posted three notices in each town, and I think I posted in some places a number more than that. I got a lot struck off, and I stuck them up where it came handy. I would not say positively that at the time of the meeting of the board of supervisors, or the presentation of the petition, I furnished proof to the board of such posting, but I think I did. I have no doubt about it at all, and if it was asked or any question about I done it. I don't recollect that particularly. The bridge first cost us very nearly $28,000. I've built it partly since. I built the iron contract here, and had something to do with the rest. We calculated to get it as near the same line of the old one as we could. We put it on the same line as near as we could mark it. I think it is on the same line. It was the same width in the roadway—exact.

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izing the rates of toll upon this bridge were such that the public could not thereafter question the legality of the structure or the right of the company to maintain it under its charter. We are also however of opinion that such action would not cure or cut off any claim which up to that time the plaintiff may have had, because of its illegal character and the injury he may have sustained in consequence thereof. The Legislature did not attempt to legalize the action of the board of supervisors in granting authority to construct the bridge in 1864, even if such an

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CROSS-EXAMINATION BY MR. HANCHETT.

I cannot exactly tell now the date when the Bay City Bridge Company was organized. I was not one of the original corporators. My connection with it was from the beginning. I virtually owned the stock from the commencement. That was the agreement. I was to own the bridge; and yet, in a business way, there would have to be a good deal of security in all of such works to get the thing along, and I proposed to run the thing myself. I did not want to get outsiders interested. I had those three men take the stock. I came up as a contractor and took the bridge. In fact I had an old man that worked for me by the name of Brown that took the contract, so I went security for the whole of them all round. Then I owned the stock virtually myself. William S. Gilbert and myself owned the stock, and I was a stockholder. The stock had been transferred to me after the organization of the bridge company, so that from the beginning I was the managing man. I was the one that first came down here to look it over and talk about the bridge, and get the rest to take hold with me. I did, by the way of William S. Gilbert, institute the proceedings to get the authority from the board. I was the one that instigated this job down here. The company was formed for the purpose of building this bridge and no other. I had already been connected with the foundation of two other bridge companies. I had built one bridge across the river at East Town the year before, so that I knew that the authority to build a bridge across the river must come from the board of supervisors. I did not write the petition that was presented to the board of supervisors for authority, but I knew what was done, and how it was being done. I think Mr. Gilbert presented the petition. I did not present the plan of the bridge to the board myself. I think Mr. Gilbert did it. I was not before the board to say anything or to do anything. I was down here backwards and forwards. I was here once or twice while they were in session, but I think I was not here the day they acted on the application. I was here when they were talking over once about the tolls; I think that's all. When I say that plan was presented to the board, I am speaking of what I understood from Mr. Gilbert, and those down at this end of the river. I went along the river myself to select a place to locate it. I think Mr. Gilbert was not with me; I think I had a man with me that I brought down here that surveyed the river and staked it. His name was Bush. I employed him, and I think we went about up to Mr. Lord's mill, and I think I was out on the ice and cut holes in it, and measured across the river every 50 feet, so that I acquainted myself with the whole space as far as I wanted to go. I did not calculate to build the bridge any further up or down than that. I talked with different parties right around Third street, and consulted with the citizens here in

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act in 1875 would cut off the right of the plaintiff to recover damages which he had sustained between those dates. The act of the supervisors in 1874 in fixing tolls thereafter to be collected and the Legislature in making legal such proceedings of the board, was but a recognition of the legality of the company and its rights after that date. Statutes are not to be given a retrospective construction unless the language thereof shows clearly such to have been the intention of the Legislature, and in this case it clearly appears that no such intention existed, but that other and far different reasons

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the city in regard to the location of the bridge. That is in the winter of '63, about 16 years ago. I heard Mr. Hart is dead now. When I speak of Mr. Hart and his conduct particularly, I haven't a bit more recollection of what he said and did than what other people said and did on the subject. He had a good deal to say about it because he was anxious, and so were others. He was in the neighborhood, and I could see him every day, or very frequently, and just so with all the rest that lived there. In regard to Mr. Hart's conduct, it is no different with him than a Mr. Barclay on the other side of the street. I was desirous and satisfied to have other people satisfied. In my location of the bridge I looked to the board of supervisors, and depended upon them for my authority. I did not look to the people for that, of course. When I constructed the bridge I looked to the board for my authority, and acted in obedience to that authority as I understood it. That's what I supposed I was doing and intended to do. In regard to Mr. Hart's conduct, I can simply say I was glad he was pleased at what we were doing. After we had got it all round in shape, and the supervisors satisfied, then I showed him what I was going to do, and they were all satisfied. When I drove that spile at the center of the swing, I can't exactly tell whether Mr. Hart was there before or after it was driven, but they all had a good deal to say about my business that morning, and they were all there looking on out of curiosity, and every one had his opinion as to whether it was too far out or in. I drove it just where I had a mind to, and they were all satisfied with it. When I started the pier I acted exactly as I was a mind to, and nobody dissented. They thought it was all right; I thought it was all right, and, says I, how is that? and they says that is exactly the spot. In putting it there I acted on my own judgment, and under the authority I got from the board. I was satisfied first, and if they were satisfied afterwards, I was glad of it, and I went on building the bridge clear through in the same way. They thought if I had a mind to come down here and fool away my money, they were pleased over it. I thought it would come out all right; I acted upon my own judgment, and in putting the bridge there and locating it there, and constructing it as I did, I did it under the authority of the board, and I looked to the board only, of course, for my authority. I could not get any sanction from the citizens here to build the bridge, no more than their will for it. I was glad if they were suited. I could not say any particular thing that Mr. Hart said on a particular day, only I know he never growled about it more than the rest. As I did my work along step by step, when I saw Mr. Hart with others I have spoken of, I called their attention to it, and as questions came up, and I asked whether they were pleased and they said they were. They found no fault only to hurry up with it.

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existed for the action of the Legislature. We need not therefore discuss at length in this case, what the effect of an act legalizing the structure from 1864 would have been or how the plaintiff might have been affected thereby. This case calls for no such investigation.

But conceding that the effect of the legislation of 1875 in legalizing the previous action of the board of supervisors was to make the bridge and pier a lawful structure, it does not follow that the plaintiff may not maintain an action for the consequential injury to his dock. Neither the super-

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RE-DIRECT EXAMINATION BY MR. HOLMES.

There was no general controversy between the citizens in regard to the location of the bridge, as I know of. There was some different parties that said they wished it could be put up at the foot of Center street. In regard to the necessity of the pier being built the length it was, I would say when I built the bridge it was before the days of tugs; vessels most all sailed up here, and I wanted to get the pier down below the bridge, so that if a vessel came up it would strike that pier before it would strike the bridge. I built it down a considerable ways on that account, and sharpened it off, and built it down farther than it might be now probably when they tug vessels through and scows and everything as handled by the tugs. Then there was scarcely a tug on the river, and vessels would come flying up through here, and I had to have a protection above and below, in order to protect it. Without this they would come up part way, and throw their anchor out, and swing right in the bridge, and I had to have a protection there. I think I put that 25 or 50 feet below the end of the swing, when the swing is open. It commenced right where the swing comes around below; I commenced and sharpened it off so as to give it a sharp point. The length is just exact as I thought about right at that time. If I was going to build one now, I would build it exactly like it, if I could.

RE-CROSS-EXAMINATION BY MR. MAXWELL.

There has been tugs on the river a good while, but there was not so many then; vessels sailed up then. I wanted to go down as far as could without any complaint, and there would no one have complained if I had gone down 10 rods further. I did not drive that group of spiles at the end of the pier. I planked up all I drove. It has been 12 or 14 years since they commenced tugging, and don't sail up so much. They don't sail up very much now, but they used to. I don't know as any of them sail at all in the neighborhood of the bridge.

And said witness being further examined by defendant's counsel testified: We did not complete the bridge entirely until along in the spring of 1865,—that is, to get the sidewalks and everything all done. Boats were running when I got the sidewalk completed. I commenced the work in June, 1864, and I think I had it done along some time in April, 1865. We had a freshet that bothered us, and I worked right along; and there was some little work about it that I done along in the spring, but we had the bridge already to cross when the ice started out. It was substantially by the fall so that we could travel. The ice was good until I had the bridge ready to travel.

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visors nor the State can directly or indirectly appropriate the plaintiff's use of the shore to public uses without compensation; and if even a lawful bridge and pier is constructed so near it as to preclude its profitable use he is entitled to compensation. If the bridge and pier is far enough from the dock so that it may be used but only with inconvenience, the same principle applies, and the question is merely of the extent of the injury.

On the part of the plaintiff testimony had been introduced tending to show that certain vessels had not stopped at his dock because of this bridge, which otherwise would have, and the business lost in consequence thereof. The plaintiff was, as a witness, then asked: "What in your judgment has been the diminution in your business in amount by this prevention or interference with the boats coming there?" *Answer.* "About a thousand dollars a year during the years 1873-4-5-6." The court in charging the jury upon this subject said that such general statement or estimate of damages was not enough for the jury to consider; that it devolved upon the plaintiff, especially if defendants acted in good faith, to show in some satisfactory way a safe basis from which they could determine the amount of his loss or injury. This evidence, following what had then been introduced, was admissible, and the particulars upon which such estimate was formed could be called out by the other side. The estimate for the purpose for which it was introduced was competent, and the weight thereof was for the jury. If the court desired the jury to understand that while they could consider such estimate of damages, yet that it was not conclusive, but that the facts and circumstances previously testified to should be considered in connection therewith, by them, in estimating the damages, then the charge would have been correct to that extent. It was competent testimony to be considered by them, but under the issue and claim of the plaintiff, the good or bad faith of the defendant had nothing to do with the question. Only actual damages were claimed, and the good or bad faith could have no bearing upon that question.

The fact that the plaintiff offered to lease some of the prop-

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erty to the defendant had no proper bearing in the case, and should not have been considered.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

RODERICK W. RUSSELL v. THOMAS NESTER, AARON T. BLISS AND LYMAN W. BLISS.

Contracts—Rights of party in default—Specific performance.

A party to a contract after being grossly in default has no absolute right to its enforcement.

The vendor of land, after warning the purchaser, who was grossly in default, sold the premises to others who knew the facts but purchased in good faith, paying a sum which would not exceed the amount remaining due from the former purchaser and which was all that could have been obtained if they had been sold on foreclosure. The former purchaser did not warn the later one against proceeding to use the lands. *Held*, that a decree for specific performance of the first contract, on a bill against the vendor and the later purchaser, was not equitable.

Appeal from Gladwin. Submitted June 10-14. Decided June 22.

SPECIFIC PERFORMANCE Complainant appeals. Affirmed.

Wisner & Draper and *Michael Brennan* for complainant.

Hanchett & Stark for defendant. Specific performance is a matter of discretion with the court to be exercised on just and equitable grounds to protect parties who have made reasonable efforts to preserve their rights: 1 Story Eq. Jur. §§ 769–776; *Smith v. Lawrence* 15 Mich. 499; *Hubbell v. Von Schoening* 49 N. Y. 331; *Bruce v. Tilson* 25 N. Y. 202.

CAMPBELL, J. Russell filed this bill to obtain specific performance of a contract whereby Nester agreed to sell

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him certain pine lands, amounting to about five hundred acres, which had been previously lumbered upon. The contract was made in December, 1874, and was for the sum of $3000, of which $100 was paid down, a lot of logs to be delivered which amounted to between $1100 and $1200, and the balance to be paid in 1876, 1877 and 1878, with interest at ten per cent.

The logs were delivered, and taxes mostly paid, but no further payment was made. Nester in February, 1878, notified Russell that he must pay at once or the contract would be forfeited. Russell not paying within the five days which Nester assumed to fix, Nester sold the property to the defendants Bliss, for the remainder due and to become due from Russell, and they took, knowing all the facts. At this time Russell made some efforts to get means but failed, and thereafter he made no personal efforts, and had no arrangements or negotiations with the purchasers. He had, soon after the contract was made, sold out a half interest to Orville C. Morris, who declined to invest further.

In the fall of 1878 the purchasers, who had not been notified to the contrary, went upon the land and during the winter got out lumber, which at the value as cut would about cover the sum which remained unpaid. Thereupon Wellington R. Burt, to whom Russell had made a sale, filed a bill to enforce specific performance, and tendered the balance unpaid, according to the terms of the contract. This suit went down for an error in the papers, and then Russell, who had taken a re-assignment, filed this bill, which is really in Burt's interest. The court below dismissed the bill.

It is not claimed that Nester's notice was of itself a complete forfeiture, but that it was a distinct warning to Russell that he must act promptly and delay no longer. The question presented is whether the delay without any further effort to pay, is such that the court should regard the purchasers as entitled to hold their bargain.

It cannot be held an absolute matter of right to have a contract enforced after there has been gross default. The vendor, if he cannot justly appropriate the moneys paid,

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and still hold the land for less than its value, should always be allowed to make himself good without being subjected to unreasonable delay, and if a forfeiture of the contract is not inequitable, the court will not feel bound to disregard it.

In the present case, if Nester had offered the property for sale on a mortgage, having the same amount due, we are satisfied the land would not have sold for any more than he obtained for it. He made nothing out of the sale, and the purchasers paid all it then appears to have been worth. If he had sold to a *bona fide* purchaser, he could not have been fairly chargeable with any more.

This being so, the delay to set up any claim to the purchasers, and the omission to warn them against incurring expense and trouble in lumbering, renders it very inequitable to allow the defaulting party to step in and get the profit which their diligence may have earned them. They did not act in bad faith, and we think they should be protected. And we think Russell has no greater equities than he would have had against Nester if the latter had sold to a purchaser who knew nothing of the contract. In that case the accountability of Nester, after such a long default, could not fairly have gone beyond the value of the land as then existing. And, as already stated, we do not think the market value would have exceeded what the Blisses paid for it.

The decree must be affirmed with costs.

The other Justices concurred.

LUTHER N. TYLER ET AL, EX'RS v. SYLVESTER B. SMITH.

Jury's findings cannot be reviewed on writ of error.

The Supreme Court has no power to review the findings of a jury, on a writ of error, since, if there is testimony enough to go to the jury, that body must find the facts for itself.

Error to Hillsdale. Submitted June 14. Decided June 22.

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APPEAL from allowance of claim by commissioners on an estate. The executors bring error. Affirmed.

Austin Blair for plaintiffs in error.

Conely & Lucking for defendant in error.

CAMPBELL, J. Defendant in error recovered in the circuit court for Hillsdale county as he had previously recovered before commissioners appointed by the probate court of that county, on a claim against his father's estate for moneys advanced at the decedent's request to relieve Waldo L. Smith, the claimant's brother, from a large indebtedness.

The executors opposed the claim on various grounds, the chief of which was that if any promise was made by decedent it was void as against the statute of frauds. The case was tried by jury.

An objection strenuously urged was the twofold claim that the proofs were not satisfactory, and the claim inequitable. It is enough to say on this matter that we have no power to revise the findings of juries on writ of error, and that if there is testimony enough to go to the jury, it is for that body to find the facts for itself.

The main controversy arose upon the claim made by the executors that Sylvester B. Smith in all his dealings for the relief of Waldo, was acting on his own behalf and on his own account, and that whatever promises were made by the decedent were verbal promises to make good his losses in case Waldo failed to pay him; and that the promises referred to testamentary provisions and to nothing else.

There was testimony from which the jury might have found this, but they did not so find. And whatever we may think we should have done had we been in their place, we cannot fail to see that there was such a conflict of testimony as left the conclusions of fact open to their determination on either theory.

It is alleged as error that the court failed to give certain charges desired, bearing on the difference between original and collateral undertakings under the statute of frauds. But

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on considering the charges actually given, we find all of these instructions were given very fully and very clearly, and that the court could not have done more to carry out the requests.

It is also urged that there was a note of $1000 held by Sylvester against Waldo, the promise to pay which was clearly collateral, and that the court erred in letting this go to the jury.

There was distinct evidence, however, that this note was given up as part of the arrangement, and that the father's liability for what he agreed to pay was in no way connected with the continued existence of the claim against Waldo. Upon this question the charge was also very explicit and excluded any erroneous theories altogether.

If any injustice has been done, it has been by wrong conclusions of fact drawn by the jury. We have no means of knowing how this may be, and no means of correcting it if it exists.

The judgment must be affirmed with costs, and the proceedings allowing the claim certified to the court below.

The other Justices concurred.

FRANCIS R. GORTON v. JOHN ROACH AND MARGARET ROACH.

Marrying mortgager's widow does not estop from contesting mortgage.

One who marries the widow of a mortgager and goes into possession of the premises under an adverse title, does not hold in his wife's right and is not estopped by his marriage from disputing the mortgage.

Error to Livingston. Submitted June 14. Decided June 22.

PROCEEDINGS under Comp. L. ch. 211 for recovery of land. Complainant brings error. Affirmed.

Ward & Palmer for plaintiff in error.

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Waddell & Montague for defendants in error. A wife in signing a mortgage to release her inchoate right of dower, is in no sense a mortgager: *Hovey v. Smith* 22 Mich. 172; *Shepard v. Shepard* 36 Mich. 178; *Kitchell v. Mudgett* 37 Mich. 84; *Conrad v. Long* 33 Mich. 80; *Gantz v Toles* 40 Mich. 728; *Miles v. Skinner* 42 Mich. 182; a mortgage without covenants of title or of warranty is like a quit-claim deed, conveying the present interest without estoppel, and would not estop the mortgager from afterwards buying in an outstanding adverse title and holding under it whether in or out of possession at the time he bought in the outstanding title: *Clee v. Seaman* 21 Mich. 296; *Fuller v. Sweet* 30 Mich. 239; *Sands v. Davis* 40 Mich. 19; *Brown v. Phillips* 40 Mich. 270; *Donahue v. Klassner* 22 Mich. 253; *McClure v. Holbrook* 39 Mich. 43; *Hogsett v. Ellis* 17 Mich. 364; and it certainly would estop no one that did not get title or possession from the mortgager: *Farmers' & Mechanics' Bank v. Bronson* 14 Mich. 368; *Wilkinson v. Green* 34 Mich. 223.

Cooley, J. This proceeding originated in the office of the circuit court commissioner of Livingston county, where Gorton instituted it for the recovery of the possession of lands under the statute which authorizes summary proceedings before a commissioner "when any person shall continue in possession of any premises sold by virtue of any mortgage or execution, after the expiration of the time limited by law for the redemption of such premises." Comp. L. § 6706.

The mortgage under which Gorton claimed was given to him by Peter McGraw June 3, 1861, to secure the payment of five hundred dollars in instalments, the last of which was due in five years from date. Margaret McGraw, the wife of Peter, joined in the mortgage. They were at the time living upon the land, and continued to live there until Peter died some time in 1864. The evidence appearing in the record indicates that Peter McGraw never had any title to the land, and that at the time of his death it was owned by Francis Palms. In June, 1866, the defendant John Roach took a lease of the land from Palms, and went into posses-

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sion. In the following year he made a purchase of it from Palms. He also at some time not specified married Margaret McGraw, who is united with him as defendant in this proceeding. It seems to be assumed in this case that the marriage took place at or before the time when Roach took possession of the land, and that the defendant Margaret has remained in possession continuously since the death of her first husband. The mortgage was foreclosed by *ex parte* proceedings under the power of sale, and the lands bid in by the mortgagor in July, 1878, and the sale became absolute in one year thereafter. This proceeding was instituted afterwards, and after a trial before the commissioner was appealed to and tried in the circuit court, where the defendants had judgment.

It seems to be the theory of the plaintiff that Mrs. McGraw, while remaining in possession of the mortgaged premises after her husband's death, was occupying under a dower or homestead right, and would be estopped from disputing the mortgage or the title which the husband assumed to mortgage; that Roach, marrying the widow and coming to the occupancy with her, took possession in her right and was in like manner estopped, and that both must surrender possession before they or either of them can set up an adverse title.

The general principle that a mortgagor cannot dispute the title mortgaged for the purpose of retaining possession adverse to a foreclosure, is familiar. But in this case the adverse title is not set up by one of the mortgagors; it is set up by one who was a stranger to the mortgage. The only way in which he is supposed to be connected with the estoppel which affected the mortgagor is by his having married the widow while she remained in possession. He had an undoubted right before the marriage to evict the widow and take possession, but having entered into possession without doing so, he has in some way, it is supposed, taken upon himself among other marital consequences the estoppel that previously affected the widow. But we are unable to appreciate the force of the reasoning in support of this view.

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When John Roach took his lease from Palms, he had a right to take possession if he could acquire it peaceably. The widow in possession seems to have made no objection, and his possession, so far as we are informed, has been peaceable ever since. There is nothing to show that the marriage was entered into and possession taken for the purpose of defrauding the mortgagee, or that John Roach ever for a moment claimed in right of his wife, or otherwise than under the adverse title. His possession from the first must be presumed to be in his own right, and his wife occupied with him because she was his wife and he was lessee and afterwards owner. If Roach independent of his marriage had a right to take possession, the marriage certainly could not preclude him. That was an affair which in no manner affected the title or right to possession of the land, but after it took place he had a right to live with his wife wherever he had a right to live separately. He cannot be required to separate from his wife in order to be in position to enforce his rights to property. And having an actual right himself he must be deemed to have held under it, and not under any claim of the wife which she does not make, and which would be unfounded if made, and which is only made for her by the mortgagee in order that he may attach to it the consequences of an estoppel.

The judgment must be affirmed with costs.

The other Justices concurred.

ASA RICHARDS ET AL. v. ALEXANDER JOHNSTON.

Damages to mill-owner from delaying logs.

Damages for injury to a mill-owner by hindering him in June from getting logs down stream to supply his mill, include also the resulting injury of keeping his mill idle during later months.

Error to Lapeer. Submitted June 14–15. Decided June 22.

TRESPASS on the case. Defendants bring error. Affirmed.

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Moore & Bentley and *W. W. & M. N. Stickney* for plaintiffs in error.

Geer & Williams for defendant in error.

GRAVES, J. The parties are mill-owners on the Flint river, Johnston being a short distance lower down than plaintiffs in error. It appears that the stream in the vicinity of the mills is not uniformly capable of floating logs when in its natural state during the summer months. In June, 1879, Johnston had a large quantity of mill logs in the river above Richards' mill which he needed to get down in season to supply the operations of his mill, and he attempted to take them down in the forepart of that month, but failed. He complains in this action that he was prevented by means of Richards' dam and canal and personal interference, and that he was thereby damaged and chiefly by his mill being forced to remain idle for the want of logs. He obtained a verdict for damages and Richards brought error.

Several objections appear in the record in regard to evidence. They required that the grounds relied on should be explained; but this was omitted and we cannot say they afford any basis for charging error.

On the argument it was conceded that Johnston was entitled to recover on account of the hindrance suffered in getting down logs in June; but it was claimed that the substantial objection to the verdict was that the circuit judge allowed recovery for hindrance during July and August, whereas during that period the use of the stream for running logs was excluded by want of water and hence that the condition of the river at that time did not permit a right of floatage nor give rise to any right in Johnston to complain of obstructions thereto on the part of Richards.

This position appears to be a misapprehension of the proceedings. There was evidence tending to show that Johnston would have run down all the logs in June had it not been for the interference of Richards, and the claim made was that the injury consisted, not in any interference with the use of the stream in July and August, but in the

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enforced idleness of the mill in these months by reason of the detention of the logs by what occurred in June.

No requests in regard to damages were made; neither was the charge on that subject excepted to and we discover no ground on which a charge of error in relation thereto could be based. The jury were fairly instructed and there is nothing to authorize any disturbance of the result.

The judgment is affirmed with costs.

The other Justices concurred.

In re estate of George Tozer.

Promise without consideration to be responsible for title.

A town treasurer sold a pump on a tax levy and the purchaser sold it to third parties who claim that the treasurer promised verbally, and without receiving any consideration, to be responsible for the title. *Held*, that the promise was a collateral undertaking involving no liability until the failure of the latter contract, under which a warranty of title was implied by rules of law.

Error to Lapeer. Submitted June 15. Decided June 22.

Appeal from order of the probate court rejecting a claim against the estate. Claimant recovered in the circuit court and the estate brings error. Reversed.

Moore & Bentley for plaintiff in error. A promise to answer for the act of another is a collateral undertaking and void if not in writing: Comp. Laws, §§ 4698, 4701; *Bissig v. Britton* 59 Mo. 204: 21 Amer. 379; *Waldo v. Simonson* 18 Mich. 345; *Halsted v. Francis* 31 Mich. 114; *Brown v. Hazen* 11 Mich. 219; *Corkins v. Collins* 16 Mich. 483; *First Nat. Bank v. Bennett* 33 Mich. 520; *Smith v. Bowler* 2 Disney 153.

Geer & Williams for defendant in error. One who guarantees the title to property which a purchaser would not have bought without his guaranty, will be liable as on

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an original promise: *Adams v. Dansey* 6 Bing. 506; *Allaire v. Ouland* 2 Johns. Cas. 52; *Peck v. Thompson* 15 Vt. 637; *Brewster v. Countryman* 12 Wend. 446; *Tarr v. Northey* 17 Me. 113; *Goodspeed v. Fuller* 46 Me. 141; *Tarbell v. Stevens* 7 Ia. 164; *Dorwin v. Smith* 35 Vt. 69; *Marcy v. Crawford* 16 Conn. 549; Throop Verb. Agreements, §§ 431–6; considerations of loss or inconvenience to a party relying on them at another's request or on his promise are good: *Train v. Gold* 5 Pick. 380; *Hilton v. Southwick* 17 Me. 303; *Great Northern R. R. v. Witham* 7 Eng. 130; *Willetts v. Sun Mutual Ins. Co.* 45 N. Y. 45; 1 Addis. Cont. 21–3, 33; 1 Wait's Actions 103.

CAMPBELL, J. David C. Briggs and William Coffron presented a claim against George Tozer's estate for damages from the failure of title of a steam pump the title of which it was insisted he had guaranteed.

The pump had been sold by him as town treasurer on a tax levy, and bid off by one Jerome Warren. Plaintiffs desired to purchase and did purchase it of Warren, but being doubtful of Warren's responsibility, they applied to Tozer, who as they claim promised to guaranty them from all harm in case any difficulty arose, and to be responsible for the title. It appears from the plaintiff's testimony uncontradicted that they bought from Warren alone, and that the promise of Tozer was on no consideration moving to him and had reference only to such purchase.

When the case went to the jury the court presented the question of responsibility in these words: "If Tozer stepped in there and said to Briggs and Coffron 'You buy that pump of Jerome Warren, I will guaranty the title,' and they would not have bought it without that guaranty, he would be liable. If he stepped in then, and said that 'I, in my individual capacity, will guaranty the title to that pump,' then he is holden, and it is an original undertaking on his part."

This promise was very clearly a promise that Warren's contract should convey a good title, and that if it did not Tozer would be responsible. Our statutes declare void

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unless in writing, "every special promise to answer for the debt, default, or misdoings of another person," and they forbid any action on any favorable representation or assurance concerning the "dealings of any other person," unless in writing. Comp. L., §§ 4698, 4701.

Whether the transaction with Tozer was a representation or assurance, or whether it was a promise, it related to a contemplated contract with Warren to which Tozer was not a party, and under which a warranty of title was implied by the rules of law. It is impossible to regard it as anything but a collateral undertaking involving no liability until Warren's contract failed. The case is a very plain one and we think the court erred in holding otherwise.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

SHUBAEL SMITH v. JOHN SMITH, JR., THERON HOUGH ET AL.

Personal decree on foreclosure—Collection of deficiency restrained.

Certain persons agreed with the defendant in a mortgage foreclosure, to purchase the property at its foreclosure sale, if they could do so for a certain sum, and afterwards to release the interest so acquired, upon payment, by defendant, of a certain amount. The premises were actually bid off to others for a sum that was less than the amount due, but was nearly enough to pay what the other parties to the agreement were entitled to thereunder, and although not parties to the foreclosure, the latter applied for and obtained an order on which execution was issued for the deficiency. The defendant had been brought into court on the original foreclosure by personal service, but had allowed the bill to be taken as confessed and knew nothing of the proceedings subsequent to the sale. *Held*, that he could maintain a bill to restrain the collection of the deficiency, as in fraud of the agreement made.

Appeal from Lapeer. Submitted June 15. Decided June 22.

BILL to prevent collection of deficiency on foreclosure. Defendants appeal. Affirmed.

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Moore & Bentley and *A. B. Maynard* for complainant claimed that defendants had done dishonestly, unfairly and fraudulently and that equity should interfere: 2 Story's Eq. Jur. (3d ed.) 1258-1265; *Laing v. McKee* 13 Mich. 124; *Wilson v. Eggleston* 27 Mich. 257; *Merrill v. Allen* 38 Mich. 487; *Huxley v. Rice* 40 Mich. 74; *Edsell v. Briggs* 20 Mich. 429; *Wyckoff v. Victor S. M. Co.* 43 Mich. 310.

Geer & Williams for defendants

MARSTON, C. J. We have no doubt whatever but that the agreement of February 22d, 1875, was binding upon these defendants. Under this agreement the suit then pending for the foreclosure of the mortgages against this complainant and his property was to proceed, and if on a sale of the premises the price did not exceed a certain sum, these defendants were to purchase the property, and complainant herein was to have two and a half years from the date of such agreement to pay defendants certain sums, and they then were to release to him all their right, title and interest in the mortgaged premises.

The premises were sold, bid off by third parties, and at a price less than the amount due as appeared by the mortgages, but within a few dollars of being sufficient to pay these defendants the amount to which they were entitled under the agreement of February 22d. They afterwards applied to the court and obtained an order upon which an execution was issued to collect from this complainant the deficiency, the difference between what the mortgaged premises sold for and the amount of the mortgages—upwards of $2000. This complainant had no knowledge of such proceedings subsequent to the sale. When the foreclosure proceedings were commenced he was properly brought into court by personal service of the subpœna, but did not appear and a decree was taken *pro confesso*.

The bill in this case was filed to prevent the collection of such deficiency—and it is here urged among other things that this complainant should have made his application to

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the court in the other cause, and that an original suit could not be commenced for such purpose.

These defendants were not parties in the other case, although after the agreement of February 22 it was carried on for their use and benefit, and the agreement of February 22d was not introduced or used in that case; indeed it was a part of the agreement that it should not be, but that in order to carry out the object and purposes of the agreement the suit should be permitted to proceed. These defendants in attempting to collect the deficiency, are attempting to violate this agreement, and their attempt to do so, and the order obtained by them in the foreclosure case, was a direct fraud upon the rights of this complainant, and would not have been permitted by the court in that case had attention been called to the agreement of February 22. The complainant in this case was not obliged to watch the proceedings in that case, as he could have had no reason to anticipate that these defendants, in direct violation of their agreement, would attempt to collect the deficiency, and upon ascertaining the fact he had a right to commence proceedings against them and protect his own rights and interests.

We are satisfied that the decree below was none too favorable to the complainant and that it must be affirmed with costs.

The other Justices concurred.

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MARGARET R. McCONNELL v. EMILY RATHBUN AND GOUVERNEUR B. RATHBUN.

Deeds—Right of way of an alley—Removal of obstruction.

A "right of way of an alley" included in a deed implies *ex vi termini* a passage leading away from the land conveyed.

All grants must be construed reasonably and in the light of the circumstances.

The grantor of a corner lot afterwards deeded an adjoining lot and included "the right of way of an *alley* 10 feet wide on rear end of

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said 82 feet," the length of the lots conveyed. Such a passage-way actually existed from the street, and the land in the rear of both lots was under the grantor's control. *Held*, that the easement included in the second deed could not be limited to a mere open space behind the lot, and that the subsequent obstruction of the outlet to the alley by persons holding under the grantor, would be enjoined.

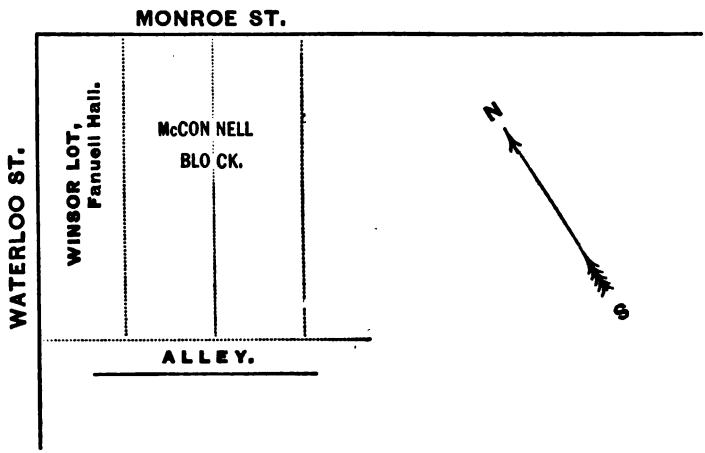
Appeal from Kent. Submitted June 15. Decided June 22.

Bill of injunction to restrain obstruction of alley. Defendants appeal. Affirmed.

W. D. Fuller for complainant.

Blair, Kingsley & Kleinhans for defendant Emily.

Cooley, J. On the fourteenth day of January, 1846, Amos Rathbun sold and conveyed to William H. McConnell a piece of land in the village—now city—of Grand Rapids, described in the deed as "a part of lot one, section seven of Campau's plat of said village, bounded as follows: Commencing at a point on Monroe street twenty-four and a half



feet from the corner of Waterloo and Monroe streets; thence along the line of Monroe street to the south-easterly line of said lot one; thence along said line, being at right angles with Monroe street, eighty-two feet; thence on a line parallel with Monroe street to a point within twenty-four and a half

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feet of Waterloo street, and thence on a line parallel with Waterloo street to the place of beginning; also the right of way of an alley 10 feet wide on rear end of said eighty-two feet." Rathbun had previously owned the lot twenty-four and a half feet by eighty-two feet on Waterloo street, and had conveyed the same to one Winsor, who had erected a building thereon covering the whole, which was known as Faneuil Hall. He also at the time of conveying to McConnell owned the land in the rear of the lots conveyed to Winsor and McConnell.

McConnell, after making his purchase, erected two stores which covered the front of his lot and extended back seventy-five feet. These were soon occupied for mercantile purposes, and have been ever since. For access to the rear of these he used a way then open and in use, in the rear of Faneuil Hall and his own lot from Waterloo street, and assumed that there was a lane or alley there ten feet in width for the whole distance. This is the only mode of access he had to the rear of his stores with teams. There is some evidence in the case that his right to pass to Waterloo street in the rear of Faneuil Hall was soon disputed, but his use and that of his grantee was not interrupted before 1870. McConnell conveyed his lot to Margaret R. Somers, now Margaret R. McConnell, in 1849, and she has ever since been the owner. Subsequently Amos Rathbun conveyed the land in the rear to Emily Rathbun, and in 1870 she or parties claiming under her commenced obstructing the passage-way at the line of Waterloo street, and threatened entirely to close up the same with buildings, and Margaret McConnell filed the bill in this case. The object of the bill is to establish her right to the alley, and to obtain a perpetual injunction against obstruction.

The bill does not claim a right to the easement by prescription, but insists upon it under the grant. Defendants claim that the grant is of the use of an alley whose length was to be measured by the width of the lot conveyed; and a plausible argument to this effect is made on the wording of the deed. But all grants must be construed reasonably,

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and in the light of the surrounding circumstances. The easement granted was "a right of way of an alley"; and this *ex vi termini* implies, we think, a passage-way leading away from the land conveyed. It would be a misnomer to call a mere open space ten feet wide in the rear of this land, shut in on all other sides by lands over which the grantee had no right to pass, either a right of way or an alley. It might be a convenient space to use for some purposes, but certainly not for a right of way. The suggestion that the passage-way intended was merely a rear passage from one of the stores McConnell intended to erect to the other has no plausibility. An alley for such a purpose would be of little or no value: the alley is needed for access to and from the street with teams.

But the difficulties disappear when we find that at the time a passage-way extending to Waterloo street was actually in use in the rear of Faneuil Hall, and that it has been in use ever since. The grant must be construed in the light of this fact; and this makes clear what the alley was the parties had in mind, and shows that it was one useful if not necessary to the proper and full enjoyment of the land conveyed. The subsequent continuous use of the alley for more than twenty years without interruption tends to confirm the correctness of this construction, though we do not rely upon it as essential to establish the right.

The circuit court sustained the easement, and we think correctly. Its decree must therefore be affirmed with costs.

The other Justices concurred.

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Robert Smith v. Abner Hubbard.

Award of costs in appeal cases not reviewed.

The discretion of a circuit judge in awarding costs in appeal cases is not reviewable by the Supreme Court.

Error to Saginaw. Submitted June 15. Decided June 22.

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ASSUMPSIT. Plaintiff recovered judgment before a justice for $40.29 damages and $10 costs; on an appeal taken by the defendant he again obtained a verdict and his damages were assessed at $50, but defendant was given costs. Plaintiff brings error. Affirmed.

F. L. Eaton for plaintiff in error. The successful party in a suit at law should recover costs: Bouv. Law Dict. *Costs;* Statute of Gloucester, A. D. 1278; 3 Terr. Laws, 1158; Rev. Stat. 1846, ch. 149, § 3; Comp. L. 1871, §§ 5375, 5459, 7387, 7427; costs on motions are allowed to the prevailing party as a matter of course unless some special reason is shown: *O'Flynn v. Eagle* 7 Mich. 306; *Ireland v. Spalding* 11 Mich. 455; an unjust award may be reviewed: *Knox v. Arnold* 1 Wis. 71; *Heeron v. Beckwith* id. 17; *Bean v. Moore* 2 Chand. (Wis.) 44; *Benaway v. Coyne* 3 Chand. 214; *Rich v. Hathaway* 18 Ill. 548; *Gallagher v. People* 91 Ill. 590; *Andrews v. Campbell* 94 Ill. 579; *Schroer v. Wessell* 89 Ill. 113; *Mitchell v. Shuert* 16 Mich. 444; *Yawkey v. Richardson* 9 Mich. 529.

Wm. H. Sweet for defendant in error. The power of the circuit court to award costs on appeal is discretionary and not open to review: *Holbrook v. Cook* 5 Mich. 225; *Chaffee v. Soldan* id. 242; *Van Renselaer v. Whiting* 12 Mich. 449; *Beaubien v. Cicotte* id. 485; *Johr v. People* 26 Mich. 427; *Polhemus v. Ann Arbor* 27 Mich. 44; discretion is presumed to have been properly exercised: *Somerville v. Richards* 37 Mich. 302.

MARSTON, C. J. While we are of opinion that costs should have been awarded the plaintiff in error in this case, and can conceive of no reason for the same not having been given, let alone giving of costs against him as was done, yet within the rule in *Hewitt v. Ingham Circuit Judge* 44 Mich. 153, we cannot review the discretion of the circuit judge even although we may think no discretion was exercised.

The judgment will be affirmed with costs.

The other Justices concurred.

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JOHN P. CLARK v. DELOS E. RICE.

Contract of purchase—Warranty—Refusal of instructions.

A contract for a machine if it is "satisfactory or does what is claimed for it" is binding if the machine meets the warranty, whether the purchaser is satisfied or not.

The refusal of a charge is not error where it is substantially given in an instruction of greater scope and more favorable to the plaintiff in error.

Error to Wayne. Submitted June 15. Decided June 22.

ASSUMPSIT. Defendant brings error. Affirmed.

R. A. Parker for plaintiff in error. A contract to pay for an article if the purchaser is satisfied with it leaves it with the latter to decide whether he is suited: *Gibson v. Cranage* 39 Mich. 49; *Brown v. Foster* 113 Mass. 136; *Tyler v. Ames* 6 Lans. 280; *McCarren v. McNulty* 7 Gray 139.

Griffin, Dickinson, Thurber & Hosmer for defendant in error.

CAMPBELL, J. The controversy in this case arises out of a claim for a patent heater, which was sold to Clark on a contract which contained this provision: "If on trial of 30 days the machine is satisfactory, or does what is claimed for it, will pay 15 dollars per inch diameter of my engine. The machine to be your property until paid for according to agreement as follows: Cash $210, four months from attaching." This clause gave rise to the dispute.

There is a great deal of evidence on both sides and quite contradictory, but no complaint is made of admission or rejection. The case is brought up on the charges.

It is first claimed that under this contract Clark could reject the heater if not satisfactory to him, whether it met the warranty or not. This we think was not what the con-

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tract required. That very clearly binds him to pay, whether satisfied or not, if the machine did what was claimed for it.

Upon the remainder of the charges we think there was no error. There was certainly evidence which was for the jury to act upon if they believed it, that Rice had complied with his contract, and in the conflict the facts were for them to decide.

The same remark will apply to the refusal to charge that certain changes and repairs were evidence of bad order in January. This was controverted by witnesses.

All of the defendant's other charges were given except one which was we think substantially given in another, which held that unless the conditions were all fully and strictly performed there was no sale. The charge not given was less extensive and less favorable. This instruction, with others in the same direction, made it impossible for plaintiff to recover unless the jury found there was no default whatever.

The judgment must be affirmed with costs.

The other Justices concurred.

RUFUS W. GILLETT AND THEODORE P. HALL v. THE DETROIT BOARD OF TRADE.

Stipulation of facts a special verdict—Negligence.

A stipulation of facts for purposes of judgment must be treated as a special verdict, and if it does not unequivocally show a liability the case must fail, as the burden of proof is on the plaintiff.

No liability for negligence can be established on a stipulation of facts which states that the act complained of was due to mistake or negligence.

Case made before judgment from the Superior Court of Detroit. Submitted June 15. Decided June 22.

TRESPASS on the case. Plaintiff brings error. Affirmed.

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H. F. Brownson for plaintiff in error.

F. A. Baker for defendant in error.

MARSTON, C. J. Judgment was rendered in favor of the defendant upon facts stipulated to by the attorneys of the respective parties. The facts as thus agreed upon we must treat as a special verdict, and unless the same, unequivocally, show a liability the plaintiffs must fail, as the burden of proof is upon them. In the sixth clause of the stipulated facts, it is said, that two car loads were number two white wheat and that they were inspected by Mr. Hatch, the inspector, as number one white wheat, through some mistake or negligence on his part.

The liability of the defendant may depend upon a determination of the fact as to whether the inspector made a mistake, or was guilty of negligence. If he in fact inspected the wheat, and was mistaken in his judgment in supposing and classifying as number one white wheat, what in fact was, or in the opinion of others was not number one but wheat of an inferior grade, it can hardly be claimed that the defendant could be held liable for the damages resulting therefrom. The defendant's liability, if liable at all, must depend upon an affirmative finding that Hatch did not simply make a mistake, but that he was guilty of negligence. If he through negligence, did not look at or inspect the wheat in these two cars, a very different case would be presented from one showing a mistake of judgment merely.

Without intimating any opinion as to the liability of the defendant in either event, we are of opinion that no liability exists upon the case presented, and the judgment will be affirmed with costs.

The other Justices concurred.

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GEORGE H. RANDALL v. MAJOR S. CHUBB.

Assignability of lease on shares—Forfeiture of personal lease.

A lease upon shares is a personal contract and not assignable where the amount of rent received must depend on the character and skill of the lessee, or where it gives the lessee the use of the lessor's tools on condition that they may be properly kept.

A personal lease is forfeited by an assignment and attempt to give the assignee possession, and the lessor may take immediate steps to recover the premises.

Error to Livingston. Submitted June 15. Decided June 22.

PROCEEDINGS under Comp. L. ch. 211 to recover possession of lands. Defendant brings error. Affirmed.

Waddell & Montague for plaintiff in error. A tenant's letting part of the leased premises on shares for a single crop is not a lease of the land and does not make the lessee on shares a tenant of the original landlord: 1 Wash. Real Prop. §§ 377–9; *Caswell v. Dietrich* 15 Wend. 379; *DeMott v. Hagerman* 8 Cowen 220; *Putnam v. Wise* 1 Hill. 241; *Tripp v. Riley* 15 Barb. 333; *Bradish v. Schenck* 8 Johns. 151; *Chandler v. Thurston* 10 Pick. 205; *Fiquet v. Allison* 12 Mich. 329; a tenant cannot so change the relation between himself and his landlord without giving up possession: *Bertram v. Cook* 32 Mich. 521; *Fuller v. Sweet* 30 Mich. 237; *Doty v. Gillett* 43 Mich. 203.

MARSTON, C. J. The evidence fully sustains the finding of facts in this case.

Chubb leased the premises in question to Ayers Stoddard for the term of three years, with the privilege of five, upon shares. Stoddard was to do all the work, find all the seed and to deliver to the lessor one-third the crops. The farm was to be cropped in a certain specified way, and the lessee was to have the use of certain farm implements of the lessor,

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and was to take good care of them and repair them at his own expense during the term of the lease. This lease and his rights thereunder the lessee afterwards undertook to assign to the plaintiff in error, and under circumstances of questionable good faith, and these proceedings were instituted by the lessor to recover possession of the premises.

The judgment of the court below was correct. The very nature and character of the lease or agreement shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive, must depend very much upon the character of the lessee, and the latter could not place a party in possession of the premises, who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful, and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms. So with reference to the use of his farm implements, one might be a careful, prudent man, who would take good care of them, while another more reckless would not by the owner be permitted to use them upon any terms. The attempt to assign this lease and put another in possession thereunder worked a forfeiture thereof, and enabled the lessor to take immediate steps to regain possession.

The judgment must be affirmed with costs.

The other Justices concurred.

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Frederick Durm v. Benjamin F. Fish.

Mortgages—Effect of release on power of sale—Sale in parcels.

A release of a parcel of land from a mortgage does not defeat the right to sell the rest of the mortgaged premises under a power of sale.

Mortgaged premises may be sold as a single parcel where they were so mortgaged, even though they have been since subdivided by the

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mortgager but without the mortgagee's concurrence; but where the parties have joined in obtaining the release of a parcel so situated as to leave the rest in distinct parcels and thus affect the security, the sale is void if not made in parcels.

Error to Berrien. Submitted June 15. Decided June 22.

EJECTMENT. Defendant brings error. Reversed.

James A. Kellogg for plaintiff in error.

O. W. Coolidge for defendant in erorr. Where lands have been mortgaged in one parcel, and are afterwards subdivided, the mortgagee, on foreclosing, can insist on a sale in one parcel unless indemnity is offered: 2 Jones Mort. § 1859; *Griswold v. Fowler* 24 Barb. 135; *Lameron v. Marvin* 8 Barb. 9; *Cox v. Wheeler* 7 Paige 250; *Sherman v. Willett* 42 N. Y. 150.

COOLEY, J. Fish was plaintiff in the court below, and sought to recover in ejectment the possession of certain premises in Niles which he claimed under a mortgage foreclosure. The mortgage which was foreclosed was given to him by one Moses Davis, and bore date May 15, 1865. The mortgaged premises were therein described as "all that part of the southeast quarter of section twenty-seven in town seven south of range seventeen west lying east of the Michigan Central Railroad and bounded south and east by section lines, on the north by land owned and occupied by John B. Reddich, and on the west by land owned and occupied by Charles H. Griffith." June 6, 1865, Davis sold a parcel of the land extending entirely through the whole tract, and on paying to Fish the purchase price, obtained from him a release to the purchaser of the parcel sold. Later in the same year he platted the whole parcel into blocks and lots as an addition to the city of Niles, and the lot previously sold and released was designated as lot seven of block two. After thus platting his land Davis sold one of the lots to Durm. In June, 1874, Fish advertised the mortgaged premises for sale under the power contained in the mortgage,

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and in his notice described the land as in the mortgage with the following added: "Excepting and reserving from such all that portion of said premises which has been released from the lien of said mortgage, and which portion is now known and described as lot number seven in block number two in Moses Davis' addition to the city of Niles." When the time of sale arrived the whole land as described in the notice of sale was offered in one parcel, and was struck off to Fish for the amount remaining unpaid. After the time for redemption had expired, this suit was instituted for the recovery of the lot which Durm had purchased and of which he was in possession.

The validity of the foreclosure proceedings is now questioned, because the sale was made as if the land sold was a single parcel, whereas the release which had been executed had made of it two parcels.

The statute regulating foreclosures under the power of sale requires the notice to contain "a description of the mortgaged premises, conforming substantially with that contained in the mortgage." It also requires that "If the mortgaged premises consist of distinct farms, tracts, or lots, they shall be sold separately, and no more farms, tracts or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage, at the date of the notice of sale, with interest, and the costs and expenses allowed by law." Comp. L. §§ 6915, 6918.

Apparently the statute contemplates that the same land which is mortgaged shall by the same description be advertised for sale. Nevertheless if a parcel has been released we do not think the right to sell under the power is thereby defeated; and it will doubtless be sufficient if the description follows that in the mortgage so as to enable the title to be traced of record, and then specifies and excepts the part released. The release, therefore, was of itself no fatal objection to this proceeding. We have no doubt, also, that where the land was mortgaged as a single parcel it may be sold as a single parcel without regard to subsequent subdivisions by the mortgagor with which the mortgagee had no connection.

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But in this case the land had been separated into distinct parcels by the conjoint action of the two parties. The release rendered necessary a change in the notice which should recognize this separation. The parceling made an important change in the security: it was no longer a mortgage on one parcel, but on two, and the land could not be advertised as one parcel, for it was not one in fact, and a notice and sale that should follow the original description would manifestly be bad. The mortgagee, therefore, must proceed according to the new condition of things which he has concurred with the mortgagor in creating, and not according to the condition of things existing before.

If we are right in this, the sale should have been made in parcels, and is void because not so made. *Lee v. Mason* 10 Mich. 403; *Udell v. Kahn* 31 Mich. 195. The point is well taken by the assignment of errors, and must prevail.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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William L. Andrews v. Charles Fillmore.

Chattel mortgage — Validity as against execution creditor.

A chattel mortgage in fraud of an execution creditor is nevertheless valid if given to secure an honest debt and taken in good faith.

Error to Macomb. Submitted June 15. Decided June 22.

Trespass on the case. Plaintiff brings error. Reversed.

Irving D. Hanscom for plaintiff in error. A conveyance is not void as to creditors unless both parties participate in the fraudulent purpose in giving and taking it: Herm. Chat. Mort. § 104.

Dwight N. Lowell and *Crocker & Hutchins* for defendant in error.

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GRAVES, J. Andrews held a chattel mortgage from one Stoddard on certain personal property, and Fillmore being a deputy sheriff seized the property on execution against the mortgagor and sold it. Andrews then sued in trover and on the trial the case turned upon the validity of the mortgage as against creditors.

The verdict was for the defendant. A charge was requested to the effect that although it should appear that the object of the mortgagor was fraudulent as to creditors, yet if it also appeared that the mortgage was made to secure an honest debt it would be valid unless the fraudulent purpose of the mortgagor was participated in by the mortgagee. The circuit judge refused to give the instruction, and ruled substantially that if the intent of the mortgagor was fraudulent as against the execution creditor, the mortgage, though given for an honest debt and received by the mortgagee in perfect good faith, could not be sustained against the execution.

In this there was error. The plaintiff was entitled to the instruction prayed for: *State Bank v. Chapelle* 40 Mich. 447; *People v. Bristol* 35 Mich. 28; *Adams v. Niemann* ante p. 135.

The judgment is reversed with costs and a new trial granted.

The other Justices concurred.

DAVID GEDDES v. TOWNSHIP OF THOMASTOWN.

Removal of school director by township board.

Proceedings by a township board to remove a school director cannot properly be taken until the action of the proper authorities has been invoked by complaint of some definite violation of duty, (Comp. Laws, § 3695); but where the plaintiff admits the charges set up against him and expressly desires the board to act on them without farther delay, he cannot afterwards complain that they did so.

The action of a town board in removing a school director is final unless speedily brought up for review.

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The wilful refusal of a school director to sign a contract made with a teacher, or to accept and file it, or draw orders for the teacher's pay while it is pending, and his obstinate neglect to furnish necessary school-house supplies, may be taken into account in proceedings for his removal.

Certiorari. Submitted June 15. Decided June 22.

L. T. Durand for plaintiff in certiorari. Proceedings to remove a municipal officer must be based on specific charges stated with substantial certainty: Dill. Munic. Corp. § 193; 2 Potter Corp. 739; Ang. & Ames Corp. § 420; *State v. Bryce* 7 Ohio 436; *Gill v. Com. Council* 9 Wis. 254; *State v. Trustees* 5 Ind. 90; *Murdock v. Phillips Academy* 12 Pick. 244; *Tompert v. Lithgow* 1 Bush 176; *People v. Board of Police* 39 N. Y. 506; *Com. v. Penn. Ben. Inst.* 2 S. & R. 141; *Exp. Hennen* 13 Pet. 230; *Com. v. Arnold* 3 Litt. 309; *Jackson v. People* 9 Mich. 111; *Mullins v. People* 24 N. Y. 399; *Chandler v. Nash* 5 Mich. 409; *People v. Highway Com'rs* 14 Mich. 528; *Rex v. Levershaw* 8 Texas 356; *Harman v. Tappenden* 1 East 562; a school director may decline to sign an order for the payment of a claim which he does not consider valid: *Stockwell v. White Lake* 22 Mich. 348.

Hanchett & Stark for defendant in error. The Supreme Court on certiorari to bring up proceedings for removing a school director, will not review the decision of the township board as to whether he has neglected to perform his duty: *Hyde v. Nelson* 11 Mich. 357; *Linn v. Roberts* 15 Mich. 447; *Brown v. Blanchard* 39 Mich. 790; *Hamtramck v. Holihan* ante, p. 127.

CAMPBELL. J. This is a *certiorari* to review proceedings to remove plaintiff from his office as school director of school district Number 3.

The case made by the affidavit, if admitted, would have shown very arbitrary and irregular action, lacking nearly all the elements necessary to valid measures. But the return, while it shows much irregularity, also shows a waiver of the

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preliminary objections, and leaves much less to be considered.

The statute, which we have had before us in the case of *Town Board of Hamtramck v. Holihan* ante p. 127, undoubtedly contemplates that no steps shall be taken until the action of the proper authorities has been invoked by complaint of some definite violation of duty. But in the case before us the return, which must govern us in our action, shows that plaintiff admitted the various charges set up against him at the meeting of the town board, and expressly desired the board to act upon them without further delay. Under these circumstances, he cannot now complain that they took a serious view of charges, which would be made serious or otherwise by proof of all the attendant facts, which he did not require to be given.

The successive changes in this statutory regulation for the removal of school officers show a desire on the part of the Legislature to enlarge the powers of the town board, and to make their action final, unless brought up for review within a very short period. See Comp. L. 1857, § 2377; Comp. L. 1871, § 3695; Sess. L. 1872, p. 88. We are bound, therefore, to assume that they regard the harmony of the district as of great importance, and do not favor any objections to removals from office that are not substantial and mischievous. The action of local boards may no doubt be unfair, and had for purposes of intrigue or oppression. But such is not the legislative presumption.

The charges in the present case, seem, from their peculiar connection, to indicate that plaintiff was obstinately indisposed to make things pleasant for the teacher of the district and the school in his charge. He is charged with refusing to sign the contract, refusing to accept and file it, refusing to draw orders for the teacher's pay during the currency of the contract and failure to supply some necessary school house supplies.

The last and what he claims to be the only charge of illegal conduct is not, standing alone, very important, but might be made so by the motive which induced it. If done

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because of an obstinate desire to avoid making the school work go on pleasantly, it would indicate a state of things which would clearly tend to destroy plaintiff's official usefulness. It is therefore properly enough considered with the other charges.

It is claimed, however, that there is no rule of law requiring plaintiff to do any of those things. He certainly is not bound to sign the contract. He is, however, bound to file it, and its filing is important for the district, as furnishing necessary evidence. He also claims that the teacher's contract only required payment at the end of the term, the language being "on or before" March 6, 1881.

This may be so, as a matter of strict interpretation, should the teacher be compelled to sue for his pay. But the compensation is rated in the contract by the month. It appears that it was understood between the teacher and a majority of the board that it should be paid monthly, and such is a common and convenient usage. If the plaintiff saw fit to refuse payment according to this understanding and against the views of the school board, we are not prepared to say it might not be regarded, if wilful and proceeding from some motive beyond a desire to do his duty, as an abuse deserving censure. Nothing is more likely to injure schools than meanness and unfairness in dealing with teachers.

There were some distinct violations of duty, and there were other acts, which, whether unlawful or not, had a tendency to show a bad motive in the rest. We have no means of judging whether the plaintiff is wronged or is in fault. He chose to submit the matter without proof, and we cannot say the conclusion of the board was unfounded.

The writ must be quashed with costs.

The other Justices concurred.

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BARTLEY CAMPBELL v. FRANK K. WALLACE.

Justices' courts—Certified transcript—Identity of defendant.

A properly certified transcript of a justice's judgment rendered in another State on personal service and appearance, is sufficient evidence of the justice's jurisdiction. Comp. Laws § 5933.

The identity of a person sued on a transcript of a foreign judgment may be presumed if his full name is identical with that of the party against whom it was recovered.

Error to Wayne. Submitted June 16. Decided June 22.

Certiorari to a justice to bring up proceedings in a suit upon a transcript of judgment. Defendant brings error. Affirmed.

Charles E. Miller for plaintiff in error. Where former conviction is to be proved the identity of the convict must be shown: *McCarthy's Case* 42 Mich. 71; the courts of Michigan have no judicial knowledge of the statute law of Illinois: *Thomas v. Robinson* 3 Wend. 267; a judgment of another court cannot be treated as valid unless it appears that the court had jurisdiction: *McEwan v. Zimmer* 38 Mich. 765; delegated powers cannot be made a basis for a judgment until it appears that they were delegated actually: *Hebert v. Bulte* 42 Mich. 491; *Goodrich v. Burdick* 26 Mich. 39.

Douglass & Bowen for defendant in error.

COOLEY, J. The assignments of error in this case are frivolous. The suit was brought upon a judgment rendered by a justice of the peace in the State of Illinois, and the transcript showed personal service and a personal appearance. The objections to a recovery upon the judgment there rendered are—*First*, that no proof is given of the identity of the party now sued with the party sued in Illinois; and *second*, that the laws of Illinois are not put in

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evidence to show that the justice in that State had jurisdiction of the case. The first finds no support in *Bennett v. Libhart* 27 Mich. 489, to which our attention was called, for the name of the party sued here was identical with that of the party against whom the judgment was recovered, which was not the case there. The second is answered by the statute, Comp. L. § 5933, which makes the transcript properly certified sufficient evidence. No defect was pointed out in the certificates here.

The judgment must be affirmed with costs.

The other Justices concurred.

THEODORE J. BONDIE v. OLIVER BOURASSA, GUARDIAN.

Judgment against sureties on appeal bond—Finding on settlement of guardian's account—Debts of ward to guardian—Debts for necessaries—Domestic relationship.

On appeal from probate proceedings for the settlement of a guardian's account the sureties on the appeal bond cannot be included in the judgment.

The conclusions of the circuit court upon an appeal from probate proceedings for the settlement of a guardian's account, should take the shape of an order showing what is allowed and what is not, and providing that it be certified to the courts below.

If a guardian can include in the final settlement of his account a debt to him incurred by his ward before the guardianship began, he cannot do so where the debt had become barred by the statute of limitations before that period.

Where an uncle furnishes board and clothing to a minor nephew who afterwards becomes his ward, the liability therefor is a debt for necessaries and does not properly spring from the relation of guardian and ward.

Evidence that a minor was an admitted member of the same family as one who was afterwards made his guardian, and was provided for as such during a period for which the guardian afterwards sought to charge him for board and clothing, is admissible in a proceeding for the settlement of the guardian's accounts.

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Error to Wayne. Submitted June 16. Decided June 22.

Appeal from the allowance of a guardian's claim against the ward's estate. The ward brings error. Reversed.

Henry M. Cheever for plaintiff in error.

No brief was filed for defendant in error.

GRAVES, J. This case originated in an application by Bourassa in the court of probate for a final settlement of his account as guardian for Bondie. The proceedings there seem to have been *ex parte*, and the account presented by Bourassa against his ward was allowed in full at $603.48; and Bondie appealed to the circuit court. Each party there brought forward an itemized account against the other and some kind of a case was made up for trial, and a hearing was had before a jury as in actions at common law. The account produced by Bourassa was treated as an entire claim in *assumpsit* and the account exhibited by Bondie was considered as in the nature of set-off.

Among the items charged by Bourassa was a claim for board and clothes furnished to Bondie from 1860 to 1865 and being eight years prior to the commencement of the guardianship. The jury gave their verdict that there was due to Bourassa for moneys laid out and expended by him as guardian, for Bondie's board, maintenance, support and clothing over and above all claims of every name and kind which Bondie had against Bourassa the sum of three hundred and fifty dollars, and that the same was due the said Bourassa upon his final account as guardian of said Bondie over and above all claims of every kind which said Bondie had against Bourassa.

There was no finding in regard to what items or demands were allowed or disallowed, although the sum awarded was nearly half less than the allowance by the probate court. The judgment entered is the ordinary judgment that the plaintiff recover, but it directs recovery of the "estate" of Bondie and also of Bouchard and Riopelle, the sureties in the bond for appeal.

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The judgment is erroneous in form. If the case had been so shaped and conducted as to authorize a proper determination in the nature of a judgment, it should have assumed the form of an order showing the allowances and disallowances and providing for a transmission of the determination, by certificate, to the courts below. The inclusion of the sureties in the judgment was unauthorized: *Willard v. Fralick* 31 Mich. 432.

There was evidence tending to show that during the period from 1860 to 1865 for which Bourassa claimed to have provided Bondie with board and clothing, the latter was an admitted member of his grandmother's family and provided for in that character, and hence not liable to be charged by Bourassa for board and clothes. The court declined to allow this to be inquired into by the jury. The ruling was improper; but a more serious point is apparent here. If any liability arose from Bondie to Bourassa on account of the board and clothing from 1860 to 1865 it was a liability for a debt for necessaries and not a claim growing out of the relation of guardian and ward, which did not arise until several years later; and if it be admitted that under the doctrine of retainer it would be competent for a guardian to make the matter of a debt incurred to him by his ward before the guardianship a subject of adjustment on final accounting, it is nevertheless certain that Bourassa can derive no benefit from the principle.

The debt in question, in case there was any in Bourassa's favor, was barred by the statute of limitations nearly two years before the guardianship, and the amount would more than cover the allowance by the jury. Further detail is needless. The nature of the proceeding to settle a guardian's account has been entirely misconceived. The subject was very fully considered and explained in *Gott v. Culp*, 45 Mich. 265, and it is only necessary to direct attention to the opinion there given.

The proceeding in the circuit court must be reversed with costs and a new hearing allowed.

The other Justices concurred.

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CATHARINE WOODWORTH v. FRANCIS R. GORTON.

Quieting wife's title as against husband's creditors.

A bill to quiet title as against an indefinite claim was properly sustained where the proofs showed that defendant had tried to sell the land under an invalid levy against complainant's husband, and that the certificate of sale had been filed with the register of deeds.

On a bill to quiet a wife's title to land upon which a levy had been made under a judgment against her husband, the suggestion that the husband's creditors may attack the wife's title is of no force where no such issue is raised by the answer and the defendant has not put himself in position to raise it on the proofs.

Appeal from Wayne. Submitted June 16. Decided June 22.

BILL to quiet title. Defendant appeals. Affirmed.

Henry M. Cheever for complainant. A bill to quiet title is not to fortify a bad one but to remove suspicions against a good one: *Stockton v. Williams* Walk. Ch. 120; complainant is not bound to show that defendant's claim would be *prima facie* good at law: *Holbrook v. Winsor* 23 Mich. 394; relief may be allowed against legal proceedings which, being defective, carry no title: *Grover v. Fox* 36 Mich. 458; see *Eaton v. Trowbridge* 38 Mich. 454; *Blodgett v. Dwight* id. 596; *Head v. Fordyce* 17 Cal. 149; *Hartford v. Chipman* 21 Conn. 488; *Vasser v. Henderson* 40 Miss. 519; *Lounsbury v. Purdy* 18 N. Y. 515; *Holland v. Mayor etc. of Baltimore* 11 Md. 186.

Ward & Palmer for defendant.

CAMPBELL, J. Complainant filed her bill against defendant as owner and actual possessor of lands in Nankin, Wayne county, charging defendant with giving out and pretending some opposing claim which she could not ascertain, but which she believed to be under some pretence of levy. The bill prayed for a decree quieting the title.

Defendant filed an answer making no admissions of complainant's rights, and denying that he had given out that he had any interest, but not disclaiming any interest in fact.

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It appeared on the proofs that he had undertaken to sell the land under a levy against complainant's husband, which was not made under a valid writ, and that the certificate of sale had been filed with the register of deeds. It also appeared that he had refused to release the claim. The court below decreed for the complainant.

We can see no reason for disturbing the decree. Defendant has not shown that it was filed without reason, and is not in a position to complain of the suit, because his own course made it proper. The suggestion that creditors of the husband might attack the wife's title is of no force, because no such issue is raised by the answer, and defendant has not put himself in any position to raise such a question. The testimony is not taken so as to try any such question, and it would be not only acting on a foreign controversy, but acting without any sufficient light to consider or discuss the possibilities of such a state of things.

The decree must be affirmed with costs.

The other Justices concurred.

Henry B. Ely v. Antoine Hergesell.

Covenants of warranty—Assignment of grantee's right of action—Rights of purchaser on foreclosure.

The grantee in a deed containing the "usual covenant of warranty" cannot sever his right of action thereon, and assign it to another person while he keeps the premises himself.

A purchaser under a mortgage is entitled to the benefit of such covenants as run with the land.

Error to Mason. Submitted June 16. Decided June 22.

Assumpsit. Defendant brings error. Reversed.

White & McMahon for plaintiff in error.

Isaac Gibson for defendant in error. Every *chose in action* springing from a contract is assignable in Michigan and the assignee may sue in his own name: Comp. L.

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§ 5775; even a right of action for a tort may be assigned: *Final v. Backus* 18 Mich. 218; so can every interest relating to property which is assignable in equity: *Cook v. Bell* id. 387; covenants do not run with a mortgage: *Ladue v. Det. & Mil. R. R.* 13 Mich. 380; *Caruthers v. Humphrey* 12 Mich, 270; *Hogsett v. Ellis* 17 Mich. 351.

MARSTON, C. J. Under the pleadings and facts found by the circuit judge in this case we are of opinion the plaintiff was not entitled to recover. The plaintiff claimed to recover as an assignee for breach of covenants of warranty in a deed of conveyance of lands, although he at no time had any right or interest in the premises conveyed. The conveyance to the plaintiff's assignor contained the "usual covenants of warranty," some of which certainly run with the land, and the grantee therein could not sever her right of action thereunder and assign the same to a third person, she still retaining the premises.

Previous to this assignment the premises had been mortgaged, and the mortgage was still outstanding and might therefore ripen into a title, and should such happen the holder thereof would be entitled to the benefit of such covenants as run with the land.

Even if this were insufficient there are still other objections to the plaintiff's recovery under the facts as found by the circuit judge. In no view of the case was the plaintiff entitled to recover.

The judgment must be reversed and judgment entered in this court for the plaintiff in error with costs of both courts.

The other Justices concurred.

IN RE HATHAWAY'S APPEAL.

Wills—Issue on probate—Testamentary capacity.

In proceedings for the probate of a will the only main issue is whether or not the paper propounded is a will, and if there are also minor issues they belong to the same inquiry and cannot be presented separately.

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A petition for the probate of a will need not allege testamentary capacity; it is necessarily in issue.

Error to Lenawee. Submitted June 16. Decided June 22.

Appeal from probate of the will of Abigail D. Hathaway. Contestant brings error. Affirmed.

Norris & Uhl for plaintiff in error. It is established practice in the following counties for the circuit court on an appeal from the probate of a will to direct an issue to be framed for a trial: Wayne: *Beaubien v. Cicotte* 8 Mich. 9: 12 Mich. 461; *Taff v. Hosmer* 14 Mich. 309; St. Joseph: *Allison v. Smith* 16 Mich. 406; *Aikin v. Weckerly* 19 Mich. 483; Lenawee: *Harring v. Allen* 25 Mich. 506; Kalamazoo: *Kempsey v. McGinniss* 21 Mich. 123.

Richard A. Watts for defendant in error.

GRAVES, J. The will of Mrs. Hathaway was admitted to probate before the probate judge, and an appeal was thereupon taken by contestant to the circuit court. The hearing was there conducted before the judge without a jury and the decree below was affirmed. A bill of exceptions was taken and a review is asked on the questions it presents. When the cause came on for hearing no formal issue or issues had been framed, and proponent's counsel proposed to proceed on the appeal papers. The counsel for contestant objected and moved that the proponent and contestant, under the direction of the court, prepare an issue to be tried. This was overruled. Contestant's counsel then prayed leave to demur to the petition presented for probate in the probate court, on the ground that it did not aver the testamentary capacity of the testatrix, nor that she was of sound mind and memory.

This was refused. One of the attending witnesses was then placed on the stand to testify, and contestant's counsel objected against the admission of any evidence on the ground that the court had not ordered an issue. The objection was overruled and the witness proceeded to testify, and was

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asked to explain the condition of the testatrix's mind at the time she made the will. This was objected to because the petition for probate contained no allegation respecting testamentary capacity and because there was no issue on the subject. This objection was also disallowed. The foregoing presents all the points in the bill of exceptions.

The case is disposed of by *Allison v. Smith* 16 Mich. 405; and *Frazer v. Wayne Circuit Judge* 39 Mich. 198. The issue or issues were inherent and it was not a necessary expedient to attempt to reduce them into written forms. The inquiry can neither be enlarged nor contracted by pleadings. There is one main issue and only one, and that is whether the paper propounded is or is not a will. There may be more or less minor issues included, but they all belong to the same inquiry and cannot be presented separately.

There was no error, and the order of the circuit court must be affirmed with costs against the contestant, and the result will be certified to both courts.

The other Justices concurred.

Henry D. Goetchius v. Elisha Calkins.

Joint note—Suretyship—Contribution.

B. and G. gave a joint note to C., G. signing as B.'s surety. C. indorsed it to P. who afterwards released it, taking instead a joint note given by G. with C. as surety. *Held*, that on the original note G. was the debtor of C. and would have had recourse only to B., and that on paying the second note he could not claim contribution from C. who was virtually his surety in both cases.

Error to Macomb. Submitted June 16. Decided June 22.

Assumpsit. Plaintiffs bring error. Affirmed.

W. W. & M. N. Stickney for plaintiff in error. When subsequent sureties become bound for the performance of the same act as the former ones, and especially by the same contracts, the right of contribution is created in favor of the former: *Keith v. Goodwin* 31 Vt. 276; Brandt on Suretyship, §§ 221, 222; and it is immaterial that they signed at

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different times: *Warner v. Morrison* 3 Allen 566; *Chaffee v. Jones* 19 Pick. 268; *Monson v. Drakeley* 40 Conn. 552; if two co-sureties are bound for a debt and one gives his note for it in payment, he can at once sue the other for contribution: Brandt on Suretyship, § 249; *Ralston v. Wood* 15 Ill. 159; *Pinkston v. Taliaferro* 9 Ala. 547; *Anthony v. Percifull* 8 Ark. 494; *Robertson v. Maxcey* 6 Dana 101; *Doolittle v. Dwight* 2 Met. 561.

Irving D. Hanscom and *James B. Eldredge* for defendant in error. Sureties must occupy the same relations to the principal to make them subject to contribution: Brandt on Suretyship, § 224; *Wells v. Miller* 66 N. Y. 258.

CAMPBELL, J. Goetchius sues Calkins to recover contribution for his alleged excess of payment on a joint note executed by the two to William Park, on the 2d of February, 1878. The consideration of this note was the release and extension of time of a former note which Goetchius and one Brown had formerly executed to Calkins, on which Goetchius was surety and Brown principal. Calkins was the nominal payee and held it in trust for other parties; and it had been transferred to Park to raise money for their benefit.

We think there is no foundation for any such claim. Goetchius was the debtor of Calkins, and was bound to pay him or his indorsee the whole of the old note, having recourse only to Brown for re-imbursement. Calkins owed him nothing, and there is no consideration whatever which would make it equitable to compel him to assume half of a debt which would have been due to himself in case he and not Goetchius had paid Park. He, in other words, is on the present note as to Goetchius as he was on the old note which he indorsed, not an original co-debtor, but a surety for Goetchius as principal debtor. When Goetchius paid the note he paid no more than as between the two he was bound to pay.

The judgment must be affirmed with costs.

The other Justices concurred.

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Henry D. Goetchius v. Josiah Sanborn.

Specific performance—Relation—Ouster by act of ownership.

A decree for the specific performance of a land contract cannot relate back to the date of filing the bill for the purpose of bringing trespass against the lessee of a defendant who holds the legal title and actual possession.

The holder of a legal title is not ousted by the act of a contract purchaser in going on the land with a team and plowing for a few hours.

Error to Lapeer. Submitted June 16. Decided June 22.

Trespass. Plaintiff brings error. Affirmed.

W. W. & M. N. Stickney for plaintiff in error.

R. L. & T. C. Taylor and *Geer & Williams* for defendant in error. Going upon land to clear it in opposition to the command of an adverse claimant does not establish, of itself, a legal possession: *Newton v. Doyle* 38 Mich. 645; the doctrine of relation does not apply for the purpose of enabling one to sue as for trespass: *Bacon v. Kimmel* 14 Mich. 201; *Jackson v. Bard* 4 Johns. 230; *Case v. DeGoes* 3 Cai. 261; *Moyer v. Scott* 30 Mich. 345; Cooley on Torts 96; there is no constructive possession of land actually adversely possessed: *Ruggles v. Sands* 40 Mich. 561.

Marston, C. J. The plaintiff in error sued the defendant, in an action of trespass, for acts done in entering into possession and putting crops in upon certain lands in the year 1876. At the time the alleged trespass was committed the title to the lands was and had been in Edwin E. Goetchius, and the defendant Sanborn went into possession, under a lease from Edwin. The plaintiff claimed that under a previous oral agreement made between himself and his son Edwin, he, the plaintiff, upon making certain payments for the benefit of Edwin, was to receive from Edwin a deed of this land; that from the time of such agreement they, father

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and son, had worked the land together for their mutual benefit; that he, the plaintiff, had made the payments agreed upon, and had taken actual possession of this land in April, 1876, a month before the alleged trespass, filed his bill in June, 1876, for specific performance of the oral agreement and obtained a decree in January, 1879; and he further claimed, that his title, by virtue of the chancery decree, related back to the time of the trespass complained of and thus enabled him to maintain the action.

The possession taken by the plaintiff in April, 1876, was to go upon the land with a team and plow a few hours. This certainly was no ouster of Edwin, and there is nothing in the record in this case, tending to show such a part performance of the oral agreement as would have entitled the complainant to a specific performance; but that perhaps is of but little importance in the present controversy.

The plaintiff herein had neither the legal title to, nor the actual possession of, the premises in 1876. Edwin was then the holder of the legal title, and had not only the constructive but actual possession of the premises. His possession was legal and he had an undoubted right to cultivate the soil, and this right he could give to another. No action could have been maintained against Edwin, in trespass, and his tenant is in no worse position. What was a legal act then could not be made illegal, by the doctrine of relation, which is to promote justice and prevent wrongs and not to create them.

Upon no possible theory was the plaintiff entitled to recover, and the judgment must be affirmed with costs.

The other Justices concurred.

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WILLIAM WARD v. THE CITIZENS' BANK [OF MARQUETTE] AND CHARLES CROWLEY.

Sale of real estate on execution—Notice of levy—Limitation on judgments.

Where notice of a levy on real estate is filed under Act 5 of 1875, a delay of five years in making sale does not avoid the levy if the judgment creditor has acted in good faith; and a levy and sale made meanwhile cannot affect it.

The judgment of a court of record in Michigan is good for ten years.

Appeal from Marquette. Submitted June 16. Decided June 22.

BILL to set aside a levy. Defendants appeal. Reversed; bill dismissed.

E. J. Mapes and *F. O. Clark* for complainant. The lien created by a levy is suspended by a direction not to sell: Freeman on Executions § 206; *Ross v. Weber* 26 Ill. 221; *Truitt v. Ludwig* 25 Penn. St. 145; *Kellogg v. Griffin* 17 Johns. 274; *Ball v. Sheel* 21 Wend. 222; *Bayly v. Bunning* 1 Lev. 174; *Eberle v. Mayer* 1 Rawle 366; *Hickman v. Caldwell* 4 Rawle 376; *Kauffelt's Appeal* 9 Watts 334; *Com. v. Stremback* 3 Rawle 341; *Lowry v. Coulter* 9 Penn. St. 349; *Wood v. Gary* 5 Ala. 43; *Branch Bank v. Broughton* 15 Ala. 127; *Wise v. Barry* 9 Mo. 131; *Albertson v. Goldsby* 28 Ala. 711; *Knower v. Barnard* 5 Hill 377; *Hickok v. Coates* 2 Wend. 419; *Rew v. Barber* 3 Cow. 272; *Lovick v. Crowder* 8 B. & C. 132; *Slocomb v. Blackburn* 18 Ark. 309; *Mickie v. Planters' Bank* 4 How. (Miss.) 130.

Dan. H. Ball for defendants. The doctrine of dormant executions applies only to personal property: Freeman on Judgments § 383; *Muir v. Leitch* 7 Barb. 341; delay in selling on execution does not defeat a lien on land; *Locke v. Coleman* 2 T. B. Mon. 12; a judgment lien cannot be displaced by a sale under any later lien: *Marshall v. McLean*

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3 Greene (Ia.) 363; *Littlefield v. Nichols* 42 Cal. 372; *Lathrop v. Brown* 23 Iowa 40; *Bruce v. Vogel* 38 Mo. 100; *Rankin v. Scott* 12 Wheat. 177; Freeman on Judgments § 196.

COOLEY, J. The bill in this case is filed to obtain a perpetual stay of execution on a judgment obtained by the defendant, the Citizens' Bank, against the Marquette & Pacific Rolling Mill Company. The facts are simple and not controverted.

On January 19, 1873, the Citizens' Bank recovered judgment against the Rolling Mill Company for upwards of $10,000. Execution was not taken out on the judgment until October 13, 1875, when it was delivered to the sheriff and by him levied upon real estate belonging to the defendant therein. On making the levy, the sheriff filed a notice thereof with the register of deeds in compliance with the statute (Public Acts 1875, p. 3), which provides that "no levy by execution on real estate, made after this act shall take effect as a law, shall be valid against *bona fide* conveyances made subsequent to such levy, until a notice thereof containing the name of the parties to the execution, a description of the premises levied upon, and the date of such levy, shall be filed by the officer making the same, in the office of the register of deeds of the county where the premises are situated; and such levy shall be a lien thereon only from the time when such notice shall be so deposited." The lands were at that time subject to a mortgage of uncertain amount, and the officer, instead of proceeding to a sale, awaited the orders of the plaintiff's attorney.

Three other judgments were subsequently recovered against the Rolling Mill Company as follows: By Gilliland and others, August 29, 1876, by Brenneman & Ward, November 20, 1876, and by Robinson & Lea, January 22, 1877; the three aggregating about eleven thousand dollars. Upon these executions were taken out in February, 1877, and levied upon the same lands above mentioned. The levy was followed by a sale in October, 1877, and William H.

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Parks became the purchaser. His certificate of purchase was at once assigned to complainant, who received a sheriff's deed in completion of the sale in January, 1879. In October, 1879, the sheriff, under directions from the attorney for the bank, proceeded to advertise the lands for sale on its judgment. The bill in this case was then filed to restrain any sale, and to have the lien claimed by the bank declared null and void as against complainant.

It is averred in the bill that neither Parks at the time of his purchase nor complainant when he took an assignment from Parks, had any actual notice of the bank levy. They had constructive notice, however, from the notice in the register's office; and this for all the purposes of this suit was as effectual as would have been actual knowledge. The case, then, must turn exclusively upon the effect of the long delay in proceeding to a sale under the first levy.

Many cases are cited by counsel for complainant which hold that when the officer levies upon personal property and then, instead of proceeding to a sale, allows the property to remain in the debtor's hands, the effect is that the lien of his levy is suspended. These are no doubt proper decisions; for the effect of such proceedings is to mislead other creditors, and to defraud them if the levy is still effectual. But they have no application to the case of a levy on land of which the statutory notice is given. This notice in the case of real estate answers the same purpose as the taking possession of the property in the case of personalty; and no one when the notice is on file need be misled.

It is also urged on the part of the complainant that a levy thus made and allowed to stand may be used for the fraudulent purpose of assisting the debtor in hindering and delaying other creditors in the collection of their demands. This is possible, perhaps, under some circumstances; but there is nothing in this case to indicate any such purpose. The evidence tends to show that the officers of the bank delayed proceeding to a sale under some expectation of receiving their money without; and no ground is furnished by the evidence for suggesting collusion with the judgment debtor.

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Under our statute the life of a judgment in a court of record is ten years. *Parsons v. Wayne Circuit Judge* 37 Mich. 287. We know of no ground for holding a levy duly made and notified void from the mere lapse of less than half this time. The good faith of the bank is not successfully assailed in this case; and we are therefore of opinion that there was no ground for setting aside its levy.

The decree must be reversed, and the bill dismissed with costs of both courts.

The other Justices concurred.

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CHARLES E. BRESLER v. WASHINGTON ELLIS, DRAIN COMMISSIONER, AND THE BOARD OF SUPERVISORS OF WAYNE COUNTY—LOUIS BRESLER v. SAME.

Certiorari to bring up proceedings to lay out ditch.

A writ of *certiorari* to review proceedings for laying out a ditch was sued out eight months after the work had been finished and when the only assessments in arrears were those for which the petitioner was liable. The work had continued more than a year and was to be paid for in three annual assessments. *Held*, that the fact that he was out of the county when he heard the ditches were finished was not in itself a sufficient excuse for his delay in suing out the writ, and that *certiorari* was not the proper remedy to enforce whatever rights he might have.

Certiorari to review proceedings to carry out public improvements should not be granted after any considerable delay in suing out the writ, unless the court is satisfied that the delay is not due to the petitioner's neglect.

Certiorari. Submitted June 16. Decided June 22.

D. C. Holbrook for petitioners.

Moore & Moore for respondent Ellis.

GRAVES, J. This is a *certiorari* to review the proceedings for the laying out and construction of certain ditches in Wayne county. A preliminary question is raised that

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the writ was not seasonably applied for and ought therefore to be dismissed. The proceedings were commenced in March, 1879, and on the 23d of June the contracts for ditching were given out. The expense was required to be raised in three instalments, one-third in 1879, one-third in 1880, and the residue in 1881. The plaintiff admits in the petition that the entire work was finished as early as July, 1880. He neglected, however, to make application for the writ until April, 1881, a period of more than eight months thereafter, and until as would seem there remained in arrear no other assessments except those charged against him.

The only reason intimated as an explanation for the delay is a statement in the petition that the plaintiff was absent from the United States at the time he was first informed that the ditches were finished in July, 1880. There is nothing in this circumstance to excuse the continued failure for so many months to take steps. There will be danger of great injustice in allowing persons to lie by in cases of this class until all the benefit to arise from the work is secured and nothing remains but the payment of their share of the expense, and then permit them to intervene by *certiorari* and procure the proceedings to be overthrown, and before permitting it the court should be satisfied that the delay has not been owing to any fault or neglect on the part of the applicant.

Whatever right the applicant may have, the present is not the proper remedy.

The writ of *certiorari* is quashed with costs.

The other Justices concurred.

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Moses Marx v. Elizabeth Hilsendegen.

Embezzlement—Cross-examination—Statute of limitations.

In trover for converting pension money collected by defendant there is no error in refusing to allow a witness for the plaintiff to be cross-examined as to whether he had never been arrested for conspiring to procure fraudulent pensions.

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Refusing on the trial to allow defendant to interpose the statute of limitations is not error.

Error to the superior court of Detroit. Submitted June 17. Decided June 22.

TROVER, begun by *capias ad respondendum* sued out by Elizabeth Hilsendegen against Marx, upon an affidavit setting forth that affiant's son having enlisted during the war, became entitled to a bounty, and that he died and affiant applied for its payment through Eugene Fecht; that the bounty was paid to Marx upon a government certificate to which he had obtained affiant's signature, and that Marx fraudulently retained the money; that affiant had not learned that the money had been so paid until a few months before beginning this action.

Fecht, being called as a witness for the plaintiff testified that he was her attorney in her claim for bounty; that he had notified her that her claim had been allowed and had delivered to her the letter from the second auditor of the treasury department, enclosing the certificate of the amount due and to be paid to her or to her order; that he had not delivered to her the certificate but had given it to Marx, who paid him his fees. On cross-examination he was asked if he was ever arrested for conspiring with others to procure fraudulent pensions from the United States Government, and the question was excluded. Plaintiff had judgment and defendant brings error. Affirmed.

M. B. Breitenbach and *Chas. E. Miller* for plaintiff in error.

Grece & Henssler for defendant in error. Defendant should not be allowed to plead the statute of limitations after plaintiff has closed his case: Comp. L. § 5794; Green's Prac. (1st ed.) 108; *Rosenbury v. Angell* 6 Mich. 508; *McHardy v. Wadsworth* 8 Mich. 349.

MARSTON, C. J. There was no error in sustaining the objection made to the question asked the witness Fecht on cross-examination. *Bissell v. Starr* 32 Mich. 299.

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The court very properly denied defendant, during the trial, the privilege of then interposing the plea of the statute of limitations in defence of the plaintiff's claim. To have permitted this under the circumstances would have been gross injustice to the plaintiff.

There was evidence tending to show that Marx had collected this money. The case was fairly submitted and the judgment must be affirmed with costs.

The other Justices concurred.

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DWIGHT W. SMITH, RELATOR v. CIRCUIT JUDGE FOR ST. JOSEPH COUNTY.

Justices' courts—Transfer of action—Levy on lands—Affidavit of amount due.

A justice before whom a suit was begun fell sick and directed it to be tried before another justice who had jurisdiction over the subject-matter. *Held*, that as the parties appeared on the adjourned day and tried the case on the merits without objection, they waived all questions of regularity and the judgment was binding.

The amount due on a justice's judgment is a jurisdictional fact in proceedings to levy on land under a transcript of the judgment, but it may be stated in the affidavit for the transcript, required by Comp. L. § 5382, to be filed with the justice, and if so set forth and promptly filed with the transcript in the office of the clerk of the circuit court, it need not be again stated in a separate affidavit to be filed with the clerk as provided in § 5383.

An affidavit of amount due is good if filed without such delay as would give rise to a presumption that payment had been made since it was sworn to, and it is generally good, if filed on the day after it was made.

Mandamus to set aside a sale, levy, execution and judgment based upon a transcript of a judgment by a justice. Submitted June 21. Denied June 22.

H. H. Riley for the motion.

F. W. Knowlton and *Dallas Boudeman* against.

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MARSTON, C. J. The motion made in this case raises two questions. Suit was commenced against the relator before Samuel R. Rockwell, a justice of the peace. On the return day the parties appeared, joined issue and the cause was adjourned by consent. The following entry next appears upon the justice's docket: "On account of sickness W. Fox tries the suit. S. R. Rockwell, J. P." On the adjourned day the parties appeared and the cause was tried, without objection, upon the merits, before Justice Fox, and a judgment rendered by him against the defendant.

We are of opinion that the judgment so rendered was valid and binding. The justice had jurisdiction over the subject-matter and the parties by appearing and going to trial, without objection, upon the merits, waived any and all questions of regularity.

A transcript of this judgment was filed in the circuit, execution issued thereon and a sale of lands made thereunder. It is claimed that no affidavit was filed as required by Comp. L., § 5383, and therefore the proceedings subsequent to the taking of the transcript were void. It appears that an affidavit for a transcript was made and filed with the justice February 14th, and a return made by the justice on the 15th and on the same day filed in the clerk's office. In this affidavit it was stated, "that there is now due and remaining unpaid upon the judgment heretofore on the 8th day of February * * the sum of ninety-six 90-100 dollars exclusive of costs." Sec. 5382 requires an affidavit of insufficiency of goods and chattels to satisfy the judgment to be made and delivered to the justice, and thereupon it becomes his duty to give a certified transcript of such judgment and proceedings, and the original affidavit by this section required. The next section makes it the duty of the clerk to file such transcript, on an affidavit being made stating the amount due upon such judgment.

The party applying for such transcript is not required, in making the affidavit required by sec. 5382, to state therein the amount due upon the judgment. It is the following section that requires an affidavit stating the amount due to

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be filed with the clerk of the circuit court. This last named affidavit, or more properly speaking evidence of the fact required to be shown thereby, viz., the amount due upon the judgment, is a necessary jurisdictional fact in order to give the clerk of the circuit court any authority whatever to act in the premises. This fact, viz., the amount due, must not, necessarily, be shown by a separate affidavit, but may be set forth in the affidavit filed with the justice. If set forth therein and filed with the transcript in the clerk's office, without any such delay as would or might give rise to a presumption that payments, after the date thereof and before filing with the clerk, may have been made, it will be sufficient and no farther showing need be made. *Udell v. Kahn* 31 Mich. 196.

This is not at all inconsistent with what was said in *Bigelow v. Booth* 39 Mich. 624. In that case eight days was permitted to pass by after the affidavit was sworn to and before its delivery to the clerk of the circuit court—a time ample indeed in which the judgment might have been paid in whole or in part. In this case the affidavit was filed with the clerk of the circuit court the day after it was sworn to, and had a new affidavit been made as required by sec. 5384 and filed with the clerk the day after it was sworn to we should have no hesitation in holding it good, and the same rule must be applied in this case. It is not the form of a second affidavit that the statute requires, but the substantive jurisdictional fact of the amount due, and this the affidavit made in the present case fully supplied.

The writ applied for in the present case must be denied with costs.

The other Justices concurred.

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JOHN ATKINSON v. THE DETROIT FREE PRESS COMPANY.

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Newspaper libel upon a lawyer—Justification—Res gestæ—Hearsay.

It is libelous to publish of a lawyer an article charging him with giving dishonest and unprofessional advice, with making false statements in professional dealings, with incurring loss of confidence by misconduct, with embezzling moneys and with making false charges for services and extorting excessive compensation.

A lawyer brought an action for libel based on a newspaper article which charged him with having appropriated more than a fair share of the moneys which a client had caused to be placed in his charge just after departing for a foreign jurisdiction where his creditors could less easily trouble him. Under a plea of justification evidence was admitted of the statements of a couple of creditors who had pursued their debtor and who professed that he had intimated some suspicion as to the safety of his funds. There was no evidence that plaintiff had done anything to have the money sent back to him, but the evidence was admitted as *res gestæ* and on the ground that the lawyer and client and the go-between who carried the money were "all together in the transaction." *Held*, error; such declarations could not be treated as *res gestæ;* nor could the conduct of creditors among themselves out of the plaintiff's presence and not communicated to or acted on by him.

Error to the Superior Court of Detroit. Submitted January 25. Decided June 29.

CASE for libel. Plaintiff brings error. Reversed.

James T. Keena, John G. Hawley, Theodore Romeyn and *Henry M. Cheever* for plaintiff in error.

F. A. Baker, E. F. Conely and *G. V. N. Lothrop* for defendant in error. The acts and declarations of others who were concerned with the plaintiff are admissible under a plea of justification in an action for libel where necessary to a full exposition of the matter, and they may be admissible against one another: 1 Phil. Ev. C. H. & E. notes 205 n. 83: *People v. Jenness* 5 Mich. 323.

CAMPBELL, J. Atkinson sued for a libel, which contained reflections upon his conduct in relation to certain dealings and transactions connected with Gardner K. Clark. Mr.

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Clark's action, with which Atkinson was claimed to have been involved, was in brief as follows:

Clark was a dealer in grain and grain contracts in Detroit, and bought and sold in considerable amounts. On April 5, 1878, Clark had in various dealings issued checks to the amount, as outstanding at the close of the business day, of $11,096.39. At the same time on that day he had on deposit at the Mechanic's Bank, $9867.51, and a check of Gillett & Hall, of Detroit, for $1014; leaving a deficiency or loss on the day's balances of $214.88. That evening he called on Col. Atkinson for professional advice. His statement is that he had reason to fear that his bank account would be garnisheed by parties in Chicago, and his business facilities be crippled so that he could not pay his checks; and that he asked Atkinson whether he would incur any criminal liability by drawing his money, so as to make a uniform settlement. He says that being informed he would not, he then told Col. Atkinson he proposed to go to Toronto for a few days until it was settled, and that Atkinson did not advise him to go.

The next morning Clark went with Atkinson and drew out his money from the bank, a messenger with a check for the balance not designated having been previously refused payment on such a general voucher. They then went to Atkinson's office, each carrying a part of the packages of notes, and at that place the Gillett & Hall check, which Mr. Clark had handed to Mr. H. E. McNeil to present at the 2nd National Bank on which it was drawn, was brought back with the statement that the bank would only pay it in the regular course of bank exchanges. This check was handed to Col. Atkinson for collection, and he was given a list of Clark's outstanding checks, and Clark desired him, if he could, to settle at one-fourth cash and the remainder on time.

Clark went over to Windsor, and missing the early train on which his wife had started, remained in the immediate vicinity at Walkertown until the noon train, on which he left for Toronto, but stopped at Hamilton that Saturday night.

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While in Windsor or Walkertown he entrusted the bulk of the money to McNeil, who during the day came back to Detroit, and delivered the principal part of it to Atkinson, who left it for safe-keeping in the People's Savings Bank, and on Monday took certificates of deposite for all but $1000, which sum he deposited in the Detroit Savings Bank. The amount of money received from McNeil is shown to have been about $8750. A portion of the balance is not fully explained.

Atkinson met the creditors three times during the day, and telegraphed to Clark without getting any reply until in the afternoon. He went to Windsor to find him, but failed to do so. At these meetings various conversations concerning settlement occurred, on which there is some conflict, but which are not important except in connection with the justification of the libel, to which reference will be made hereafter. At the last meeting he offered the terms given him by Clark in the morning, but they were rejected. The communications concerning the settlement are among the matters involved in some controversy, both as to time and circumstances.

Atkinson left the Gillett & Hall note at the People's Savings Bank, and took therefor a certificate of deposit. Gillett & Hall stopped its payment, and Atkinson took it back and informed Gillett & Hall it would not be used to their prejudice. Upon the terms of this communication some questions also were made at the trial, as raised by the libel.

Two of Clark's creditors, Messrs. Lasier and McDonald, visited him at Hamilton and induced him to return to Detroit, agreeing to see that he was not molested there. They reached Detroit early Monday morning, first calling on McNeil and then going to Col. Atkinson's house, where they remained a while and appointed a meeting at Clark's house at a little later hour, with the expectation of coming to an arrangement. At the agreed time it was found by Lasier and McDonald that the other creditors stood out, and were disposed to prosecute, and accordingly they took

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Clark back to Windsor. In the meantime some creditors had sent to Clark's brother in Boston, and on Tuesday morning he arrived. Atkinson made a settlement and turned over the money and securities. This settlement is also involved in the libel. Clark, through his brother, settled for 75 cents cash, and got time for the balance.

On Tuesday, the 16th of April, one week after the settlement, the libel complained of was published. The managing editor before publishing it had interviews with various creditors and other parties concerning its correctness. Some opposed and some did not oppose its publication. It was not published at their instance. After its publication a communication was published signed by Mr. Clark, and approved—so far as his knowledge went—by Col. Atkinson. In publishing it the editors of the *Free Press* commented on it at some length, referring to facts outside of it, and in conclusion said: "It is difficult to see wherein the *Free Press* statement of Tuesday needs to be corrected in the interest of that truth which Atkinson wishes to spread before the public."

This last publication was introduced to show malice in repeating and adhering to the charges before made, and is not made the ground of action by itself.

The publication sued on consisted of a continuous narrative, with a conspicuous heading, purporting to give a full account of the entire dealings of the parties said to have been involved in Clark's affairs. The whole libel is set out as a single grievance, the account being so drawn up as to prevent any convenient separation of Atkinson's part from the rest. But the grounds on which the principal grievances appear to be based are chiefly these:—The heading was in these words: "*An inside view—Some hitherto unpublished facts respecting the Clark affair—The figure which several parties cut therein—The movements of Clark and the action of his attorneys—Clark's 'misfortunes' the biggest kind of grist for his lawyer—Rather slight services for a very large fee*—$125 *gathered in for 'previous ser-*

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vices'—A plain, unvarnished tale from which each reader can draw his moral.

These references to professional misconduct, which are undoubtedly libellous on their face, appear from the body of the publication, and are also averred by the innuendoes to relate to Col. Atkinson. It is claimed, and I think justly, that they indicate that Atkinson took advantage of Clark's circumstances to make extortionate charges for services and pretended services.

In the body of the principal article, the chief indications of an offensive character, as apparent from the words alone or as applied by the innuendoes, seem to include a series of acts, which are declared to "reflect no credit on the parties of the second part, who have figured more or less prominently in the affair." Atkinson and McNeil are the only persons mentioned, and it is averred the reference was made to plaintiff, who is also connected by averment with a previous reference to a "'power behind the throne,' which moved in a mysterious way." Proceeding with the narrative, reference is made to Clark's claim that he heard Chicago parties meant to garnishee his deposits, and it was stated that on Friday evening or Saturday morning, at McNeil's suggestion, Clark called on Atkinson. Then follows this sentence, which is by averment alleged to mean that Atkinson gave advice which was improper, dishonest, and discreditable to him professionally: "The advice that was given to Clark by Atkinson is of course not positively known to any beside those two, but the subsequent visit of Clark and Atkinson on Saturday morning to the bank, and their drawing out the money, to be followed almost immediately by Clark's departure for Windsor, caused certain inferences to be drawn, too obvious to mention."

The article then stated that, "On withdrawing his money, $9867, from the bank, Clark passed part of it to Atkinson, which, on arriving at the head of the stairs, leading to Atkinson's office, was, Atkinson stated, passed back to Clark." This last phrase, "Atkinson stated," is averred to mean that Atkinson retained a part of the money, and at

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the close of the article is a further statement, with similar averment of its reference to Atkinson, that "some one has in the neighborhood of $500, which is, as yet, not present or accounted for."

In the narrative of the proceedings of Atkinson and the creditors on Saturday reference is made to the concealment from Atkinson by the creditors of their knowledge of Clark's movements in Canada, as reported to them by Captain Rogers, the chief of police, who happened to be in his company, and also to certain matters connected with the Gillett & Hall check, concerning which it was intimated that Atkinson made false suggestions as to his own course in saving Gillett & Hall from responsibility. There are also further descriptions of Atkinson's statements concerning the amount and whereabouts of the money drawn, and a reference to information derived from Clark by Lasier and McDonald, as to his communications with Atkinson and his transmission of the money to Atkinson, with further intimations, as drawn from the language directly, or implied by averment, that Atkinson made false statements to the creditors concerning this money, and concerning his authority.

There is then a passage stating that Clark when found by Lasier and McDonald "showed his lack of confidence in his home representatives by offering to telegraph and have a detective shadow the man who had his creditors' money, until they could get back to Detroit." This is averred to refer to Atkinson, as also a further statement that Clark "finally consented to return to Detroit, and endeavor to regain possession of his, or rather, his creditors' money."

In describing the subsequent occurrences in Detroit when Lasier & McDonald visited Atkinson, it is said that Clark informed them, that McNeil said he had given the whole money to Atkinson, but that Atkinson claimed it was $500 short, and this is averred to mean that Atkinson claimed he received so much less than he really did.

It is subsequently stated that Clark's brother was informed when he reached Detroit by three persons named T. P. Hall, Alexander Lewis and John G. Erwin, that the credit-

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ors were unwilling to trust Atkinson, and they thought a speedy settlement could be made if Clark could be got out from his influence. This is connected with an allegation that it meant to indicate that Atkinson was unworthy of credit in his profession. This was followed by a reference to the final settlement, when Atkinson is averred to have rendered an account of which it is said "a copy of its most important items is appended." This reference gives special attention to an item italicised as for "*previous*" services, which is alleged to mean that the charge was false and discreditable. It then is followed by a series of calculations including similar intimations as to charges for services, and ending with the remark previously mentioned that "some one has in the neighborhood of $500, which is, as yet, not present or accounted for." This is alleged as "meaning that plaintiff, in his employment as aforesaid, has dishonestly failed to account to his client for $500 entrusted to him." There are two counts in the declaration, but for present purposes I need not refer to them at large. The defendant put in the general issue, with a general justification.

The effect of the various statements claimed to be libellous was to charge Atkinson with giving dishonest and unprofessional advice, with making false statements in professional dealings, with incurring loss of confidence by misconduct, with embezzling moneys, and with making false charges for services, and extorting excessive compensation. All of these are in the declaration alleged as appearing in the libel, and intended to be conveyed by it.

When no defence is put in except the general issue, the language of a libel may be shown to fairly bear a mitigated sense. But when a libel is justified generally the doctrine is well settled that so far as the justification is concerned, it is justified as applied or explained by the innuendoes, and therefore there is no justification made out by the evidence unless the facts are proven true as alleged in the declaration, and with the meaning there averred, unless with the aid of the colloquium such meaning is repugnant. Townshend on Libel

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and Slander §§ 212, 214, 215, 357, and notes; *Bissell v. Cornell* 24 Wend. 354; *Fidler v. Delavan* 20 Wend. 57; *Tillotson v. Cheetham* 3 Johns. 56; *Gage v. Robinson* 12 Ohio 250; *Helsham v. Blackwood* 5 E. L. & Eq. 409; *Lewis v. Clement* 3 B. & Ald. 702: 3 Br. & B. 297; *Lake v. King* 1 Wms. Saund. 130 and notes; 1 Chit. Pl. 433; *Weiss v. Whittemore* 28 Mich. 366; *Cresinger v. Reed* 25 Mich. 450; *Bailey v. Kalamazoo Pub. Co.* 40 Mich. 251. Unless every material item of defamation is established the plaintiff must recover his damages for so much as is not fully justified. The truth of one part cannot deprive him of his action for that which is not shown to be true.

It has not been suggested in this case that any of the averments of the defamatory meaning of parts of the libellous article are repugnant or not maintained by the article itself as read in the light of the other averments. As to such statements as refer to hearsay, or are claimed to be capable of a double sense, the averment of their offensive meaning makes them libellous if justified. Giving defamatory statements as coming from other persons does not deprive them of their defamatory character. *Burt v. McBain* 29 Mich. 260.

A considerable number of the errors assigned are supposed to depend on these principles. Others relate to the reception or rejection of testimony. While the record is long, the questions presented may be to some extent dealt with so as to avoid the necessity of great repetition. So far as the objections refer to the admission of testimony, they are chiefly based on the ground, which is undoubtedly correct as far as it may be applicable, that nothing was properly at issue that had not some tendency to show the charges against Atkinson himself, well or ill founded in fact, or else credibly represented to be so, and published in that belief. How far the matters affecting him personally can be separated from the rest is therefore one of the questions of some difficulty in the case.

The record is free from some complications that have caused difficulty in other causes. While the good faith and

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probable cause of belief of the managers of the defendant corporation appear to be involved here as they are in most similar cases, there is no controversy concerning the deliberate and intentional character of the publication, and therefore no dispute as to the persons responsible. The repetition in the supplementary article, and the knowledge and approval by the managing editor, remove any such question from the issues. Neither is the article connected with any matter concerning which it could be regarded as privileged. It does not relate to facts which could be lawfully published except as true.

The first class of objections to evidence included some extended narrations of Clark's dealings on the fifth day of April. There is nothing in the libel either in direct language or as made out by averments or innuendoes, which charges Atkinson with any complicity in these dealings. A general notice of justification must undoubtedly be construed as covering all the ground which could be covered by special pleas. But no plea would be proper which attempted to prove by way of justification facts not charged against the plaintiff. If Clark had been plaintiff, the testimony of his dealings on the 5th would be very material. The admission of this could only be pertinent to create a belief that there was some dishonesty which bore upon the plaintiff. It could hardly fail to prejudice him by coloring the whole case with matter to which he was a stranger. The libel begins his connection with Clark after the close of business on the 5th, or in the morning of the next day. It was not disputed that it might be shown what was the condition of his bank credits and checks out at that time, and who held them. But the details of his business dealings which led to that condition of things could have no legitimate bearing on anything alleged against Col. Atkinson, and the justification cannot go beyond the charges.

A second class of testimony objected to is the statements and conversations of Clark with and to various other persons, while in Canada, including McNeil, McDonald and Lasier. The court allowed all of the conversations to be shown.

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And the reason given is found in what was said by the judge when McNeil was sworn, although similar rulings had been made before during the examination of McDonald and Lasier. When McNeil was inquired of concerning the transaction between him and Clark, the court used this language: "The claim in the article is, as I understand it, that McNeil and Atkinson and Clark were all together in this matter, and I think myself that what any one of them did, or any two of them did, would bind Col. Atkinson. It was a part of the *res gesta* as I look at it. And it is a part of the article, I believe; it has been so stated." Here the counsel for defendant was proceeding to show the court was mistaken as to the tenor of the article, when he was interrupted by the court, who proceeded as follows: "As far as there is anything in the case at all—and of course it is a question for the jury—the testimony shows that McNeil and Atkinson and Clark met together, and that McNeil and Atkinson and Clark were together in the matter, and the article, perhaps, substantially charges they were all together in the transactions; and I think you have a right to show [what] the conversations and transactions of the parties were at the time, to show what the real transaction was." On further objection that it was not shown in any way that Atkinson had any knowledge of the conversations, the court nevertheless ruled that all the testimony might be let in.

In a part of this ruling the court seems to have held, and the admission of testimony from McDonald and Lasier evidently could only be explained on this theory, that the fact that the article charged complicity between all three of these parties made the statements of any of them admissible. If all three had joined in this libel suit, there might be some difficulty in drawing lines very closely. But this suit is brought by Atkinson for libellous allegations against himself alone, and hearsay evidence is no more admissible against him in this than in any other case. If charged as a conspirator, the charge cannot be assumed as true until proven, and it certainly is not competent to prove a conspiracy by the declarations of a portion of the persons alleged to have

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conspired. The conspiracy and its extent must be definitely and positively proved by legal evidence, before court and jury can give heed to any act or statement of persons not parties to the suit as to particular acts done under it. In this class of cases it is not permissible—on any theory of the order of proof—to allow hearsay that has not already been shown to be within some rule of agency. If, when the evidence is offered, there is not already in the case enough to show the agency, the admissions and statements of the supposed agent must be kept out. Agency or conspiracy is the first thing to be shown. The evidence was not admitted on the ground that the order of proof was discretionary, but on broader and absolute grounds. The question therefore arises in a double aspect: *First*, whether there was any charge in the libel which was justified on any such basis; and *second*, whether any such conspiracy had been shown by legal evidence, on which it would have been competent for the jury to have found it. The principal if not the only questions raised here do not relate to the transactions while Clark was in Detroit, but to the transmission and reception of the money from Canada and dealings subsequent thereto, or to Clark's departure from Detroit on April 6th. It is very plain that evidence of an agreement or combination, even for an unlawful purpose, has no tendency to prove such agreement for other purposes, and that where a conspiracy for wrong purposes is clearly proved, there is no responsibility for mutual conduct between the scope of that agreement. This is sufficiently explained in *People v. Knapp* 26 Mich. 112.

Our attention has not been called to anything which indicates a charge in the libel that Atkinson was in any way implicated in any arrangement for the return of the money from Canada, or to any suggestion that when Clark left Detroit any such return was thought of. Nor is it pointed out in the argument in what way that return was calculated or intended to injure any one. The possession of the money by Atkinson prior to the last meeting of creditors on the 6th, and the purpose for which he held it, did become

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material in view of other allegations concerning his statements and course at that meeting. But it does not appear that he was accused of any conspiracy to get it back into his hands, or that it was returned in furtherance of any such conspiracy. In regarding the proof, therefore, we must not confound the testimony as to the fact of its return with that which is hearsay.

So far as McNeil's testimony is concerned, it contains no statements of any consequence by Clark as to any act or declaration of Atkinson, and except for the ruling of the court that all were bound by each other's acts, it would not be very important. So far as it explains the purpose and conditions on which the money was put in McNeil's hands, it had no tendency to prejudice Atkinson, and being uncontradicted has a strong bearing in his favor, as it shows no authority whatever for giving him the money, and indicates that it was only given him as a safe custodian.

But in regard to McDonald and Lasier the case is different. Both were allowed to give their impressions, although neither was positive on the subject, that Clark said he directed the money to be put into the hands of Atkinson. This, taken in connection with his other statements in regard to his fears about the money, and distrust of its safety, must necessarily, in view of the ruling concerning joint liability, have operated to Atkinson's prejudice. Aside from these statements, there is nothing in the record tending to show that Clark was in any way concerned with Atkinson's obtaining possession of the money. And leaving out these statements, the testimony introduced by the defendant and not explained by any opposing proofs, tends to show that Atkinson did not receive the money for Clark himself or subject to his disposal, but as the property of Mrs. Clark, to whom he gave vouchers for it.

Some of these statements and suspicions, if they referred to Atkinson at all, upon which it will be necessary to dwell a moment hereafter, were made for a hostile purpose and in concert of action with the creditors. Upon what theory such declarations could be regarded as *res gestæ* in a con-

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spiracy with Atkinson it is impossible to imagine. It is quite evident that the court below deemed it desirable to have all the transactions of Clark explained, as connected with the libel, on the same basis as if Clark himself were plaintiff. But I do not think this identity of interest is within any proper theory of the case.

In this connection it is proper to refer to testimony not merely in reference to the statements in the libel as to Clark's lack of confidence in his agents, but also as to the opinions of the creditors. No doctrine is better settled than that a person has no more right to put in circulation the opinions or statements of other persons concerning private character than he has to publish his own. When such publication is made it cannot be justified by the proof that such views were expressed or entertained. Every justification must stand on facts and not on opinions or hearsay. Any inferences warranted by evidence may be drawn by the jury, and of course may be pressed on their attention, but no man's character can lawfully be assailed, and the object of every plea of justification is to directly assail it, by proof that other men do not have confidence in him, or speak evil of him. *Burt v. McBain* 29 Mich. 260; *Fowler v. Gilbert* 38 Mich. 292; *Watkin v. Hall* L. R. 3 Q. B. 396; *M'Pherson v. Daniels* 10 B. & C. 263; Townshend on Libel and Slander § 211.

For similar reasons evidence of the conduct of the creditors among themselves, and not in Atkinson's presence, and not communicated to or acted on by him, can in no proper sense be treated as part of the *res gestæ* to his prejudice. It is only his dealings that are in issue in this cause, and except as he is shown to have been in connection with others, their acts and sayings are outside of the controversy.

I think, subject to such exceptions as would exclude hearsay evidence, and matters otherwise irrelevant, that it was not improper to allow testimony of the whole course of negotiation and correspondence which resulted in a settlement. It was substantially one train of transactions begun by Atkinson and completed by Charles F. Clark, and Atkin-

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son was more or less connected with the business until he turned over the funds and rendered his accounts. The terms of the settlement itself and whether it was complied with by Clark were not relevant.

I also think it was proper to allow Mr. Quinby and the others connected with the publication to show the circumstances which induced them to publish it. These matters bore upon the motives of the publishers, and, while no complete justification, would be properly open to consideration on the question of damages, if not justified by other proofs.

I see no good reason for rejecting proof of the value of Atkinson's legal services. Overcharging under peculiar circumstances was one of the most offensive suggestions of the libel. And a portion of the testimony excluded seems to have been relevant to the fact of garnishee proceedings as having once been had against Clark.

The charge of the court throughout disregarded the rule that a justification cannot be made out without proof that the plaintiff was guilty of the acts charged against him in the sense averred in the declaration. As this error pervades the entire charge, it is not necessary to refer specifically to the various instances in which particular portions were referred to specially and either declared not libellous or left to the jury to interpret.

The case was left to the jury with such instructions as would have authorized them to find, as they did find, a complete justification. This could only have been done by allowing weight to facts not proven by any legal evidence, and probably in accordance with the theories before referred to. But a plea of justification is an affirmative charge, to be made out by proof as strictly as if the defendant were a plaintiff seeking to enforce a liability. The libel itself is no proof, and no help to proof. Upon some very important charges there was no proof whatever, and upon some the defendant's testimony exculpated the plaintiff directly. There was no proof tending to show that Atkinson had any money not accounted for. There was none that he and Clark had any difference in regard to the funds, or that he

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had done anything with them not authorized. Upon other points the testimony was more or less subject to the infirmities before referred to. The result of the trial and the size of the record indicate that whatever may be the facts upon the issues properly in the case, it has been tried upon other facts and different issues to a sufficient extent to render it impossible to sustain the verdict.

The judgment should be reversed with costs, and a new trial ordered.

GRAVES, J. It is my opinion that the declaration discloses a cause of action and that the record contains evidence tending to support it, and sufficient to warrant consideration by a jury. In regard to the ruling and proceedings relating to the objections against the conversations in Canada between Clark and McDonald and Lasier I agree with Mr. Justice Campbell, and I agree that a new trial is unavoidable.

Concerning the other topics brought under discussion I reserve my opinion.

MARSTON, C. J. concurred.

COOLEY, J. *dissenting.* The plaintiff sues in this case to recover damages for the publication by defendant of an alleged libel in the Detroit *Daily Free Press.* The plaintiff is a prominent and reputable member of the Detroit bar. The defendant publishes a reputable paper of large circulation in the State and elsewhere, and it is not claimed that the conductors are habitually negligent or reckless in its management. The question of liability is therefore confined very closely to the particular article complained of, and the facts to which it relates, and is not in any manner affected by the antecedent conduct of the writers for the paper or of its publishers. The defendant on the trial relied upon a justification of the truth of the article published, and the verdict was in its favor.

Upon the main facts in the case there is not much dispute. On the fifth day of April, 1878, Gardner K. Clark was a member of the board of trade of Detroit, and was engaged

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in the purchase of grain. He had in the Mechanics' Bank at the close of banking hours standing to his credit the sum of $9867.51, and had issued his checks for $11,106.39, which according to the regular course of business would be presented for payment the next day. He also had a check given him that day by Gillett & Hall for $1014, which he had not deposited. This check, if deposited, would have left a deficiency in his bank accounts of $224.78 when the checks he had drawn should be brought in. Under these circumstances, in the evening of that day, accompanied by one McNeil, who was a member of the bar, and seems to have had a desk in the plaintiff's office, Clark applied to the plaintiff for professional advice—going to the plaintiff's residence for the purpose. In the interview plaintiff says: "Clark told me in substance that he had been delivering grain during the day, or that contracts for grain had matured, and that he had been making settlements with parties, and that he had also been receiving grain or making settlements with parties with whom he had contracts to deliver him grain, and that he had given a number of checks and had received moneys or checks from other parties with whom he had dealt during the day, and that he was fearful that his account would be garnisheed by some Chicago parties [with whom he had had previous litigation] and that his account was short of sufficient to pay the checks that were due." The shortage was stated to be about $1000, and the names of parties holding his checks were given. In the same conversation Clark spoke about owing his wife some $2500; and he asked plaintiff's advice whether there would be any criminal liability incurred by his drawing out his money from the bank. The purpose indicated in drawing it out was to enable him to effect a compromise with his creditors. "As I understood him he wanted to effect some compromise. He hadn't money enough to pay them in full, and he had either got to make a compromise or somebody got to lose his entire debt, and he was desirous of making a compromise." Plaintiff advised Clark that there would be no criminal liability in his withdrawing his money from the bank,

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and he expressed his purpose to do so the following morning. It was then arranged that Clark should meet plaintiff at plaintiff's office at a quarter to nine the following morning, for the purpose of talking over his affairs further, with a view to their adjustment. At the meeting which took place accordingly Clark gave plaintiff to understand that he wished him to undertake the settlement of his affairs. "He told me he wanted, if possible, to continue in business; and he wanted to have his creditors seen, and to see if they would take a certain amount in cash and give him time for the balance, so as to leave him some capital with which to continue in business. The proposition he instructed me to make was 25 per cent. in cash and the balance in three quarterly payments as I remember it." In this interview or in that of the previous evening Clark told the plaintiff that he thought of going to Canada for a few days, until his affairs could be settled, and asked plaintiff's advice about it. Plaintiff told him he thought it was a very serious step, and he could not advise him to take it. Clark nevertheless seemed to have made up his mind to go, and got $20 of plaintiff to send to his wife, who was to meet him at the train.

When the bank opened in the morning, Clark, accompanied by the plaintiff, called, and drew out the whole sum standing to his credit. Together they went to plaintiff's office with the money, and while they were going up stairs to enter the office, McNeil or some other person appeared with the Gillett & Hall check, and handed it to Clark, stating that the bank refused to pay it except through the regular exchanges. Clark took the check and handed it to plaintiff, with instructions to collect it. Other evidence showed that McNeil had been requested by Clark to get the money on the check, and that he had sent it by one Sheldon to the Second National Bank, where payment was refused as above stated. Clark was in plaintiff's office ten or fifteen minutes after handing over the check, and then left, saying he was going to Toronto. After he had left, plaintiff deposited the Gillett & Hall check in the People's Savings

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Bank, and took a certificate of deposit therefor, payable to his own order.

After Clark had gone, plaintiff took steps to see the creditors. He saw Mr. Alexander Lewis, one of the creditors, about ten o'clock the same morning, and arranged with him for a meeting of creditors at eleven. At that time plaintiff met the creditors, but made them no proposition. Mr. T. P. Hall, one of them, suggested that if they could get 50 cents on a dollar of their claims, "they would be well out of it," but no formal proposition to take that proportion was made. They however asked plaintiff for a proposition, and he made them none, but said he would go over to Windsor, where he supposed Clark then was, and meet the creditors again at one o'clock. Plaintiff went accordingly, but after spending some time in searching for Clark failed wholly to find him in Windsor, and returned at about two o'clock. The fact was, as afterwards appeared, that Clark had left Windsor on an eastern-bound train at twelve o'clock; a train of which plaintiff had no knowledge. Before returning, however, on the supposition that Clark must have taken an earlier train, plaintiff sent a telegram to be delivered to him at London, inquiring if he should offer 50 cents in settlement. Clark's wife in fact had taken the earlier train, and this telegram was delivered to her, and an answer returned that Clark was to take the next train. As the noon train, of which plaintiff had no knowledge, was the next train, plaintiff returned to Detroit under the impression that Clark had not yet taken the cars. He met the creditors at three o'clock or thereabouts, and there learned from some of them that they were aware of the fact that Clark left Windsor at twelve. At plaintiff's suggestion, made in expectation of receiving an answer from Clark to the telegram sent to London, the meeting with the creditors was adjourned until five o'clock.

When Clark went to Windsor in the morning McNeil appears to have followed him. He found him at Windsor at ten or soon after, and Clark informed him he had missed the first train, and made an attempt to get an engine to take

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him to Hamilton, but failed. They walked together up to Walkerville, and Clark went back into a wood-pile, produced the money which he had carried about his person, took a package from it and delivered the balance to McNeil, telling him to take it to his, McNeil's, house or barn and bury it. McNeil says he took it as attorney for Clark's wife, by Clark's direction. Instead of returning directly to Detroit by the regular ferry, he took a hack to Sandwich, then a sail-boat to the American side, landing near the fort, and then went up town, not by the street cars, but a part of the way on foot and a part of the way by carriage. He went directly to plaintiff's office, and in his testimony he explains what he did with the money as follows: "After having it in my possession I felt nervous and uneasy about it, and concluded I would get it out of my possession; and instead of following the instructions, I turned it over to Col. Atkinson and took his notes payable to the order of Mrs. G. C. Clark." These notes he sent to Mrs. Clark at Hamilton by mail. He says, however, that before delivering the money to plaintiff he took out and retained $350, and that plaintiff gave him $100 the next morning.

The amount actually handed by McNeil to plaintiff appears to have been $8750. Of this plaintiff deposited $7750 in the People's Savings Bank and took certificates of deposit therefor, payable to his own order; the balance he put to his own credit in his private bank account. The Gillett & Hall check having been refused payment when presented by the Savings Bank, plaintiff took it up and returned to the bank the certificate he had received for the amount when he deposited it.

At five o'clock plaintiff again met the creditors. He had then no word from Clark. He offered the creditors 25 cents in cash, and the balance in paper at three, six and nine months, but the offer was not accepted. Later in the day plaintiff received a telegram from Clark telling him to offer forty cents; and still later another telegram informing plaintiff that Clark would stop over in Hamilton the next day—which was Sunday—and requesting plaintiff to disabuse the

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minds of any who might think he had run away. The next morning plaintiff telegraphed Clark at Hamilton that matters were going smoothly, and he thought a settlement would be reached on Monday. Later in the day he received a telegram from Clark, which he understood to refer to McNeil, as follows: "*Personal*—Don't allow the party who came to your house with me out of your sight. Keep this from him. Letter to-night. C." On the morning of the same day an article appeared in the *Free Press*, giving some account of the affair so far as it had then become public, and commenting with severity upon the course of Clark.

No result having been reached at the five o'clock meeting of Saturday, two of the creditors, McDonald and Lasier, started for Toronto by the Grand Trunk road to find Clark. They could get no further than Hamilton, but there at the hotel Clark was found. They told him they had come to get a settlement, or to find out what he meant, because they had lost confidence in the attorney who was acting for him. Clark was surprised at seeing them and showed them plaintiff's telegram that all was working smoothly. He told them nearly all the money had been sent back to Detroit, and that he had instructed plaintiff to settle with them the best he could. He then proposed to give an order for the money and let one of them take it back to Detroit, but instead of informing them on whom he would draw, proposed to telegraph the name to Detroit. In the course of the interview they drew from him the fact that the money had been entrusted to McNeil, but not until after he had offered to telegraph and have a detective put on the track of the person who had the money. He also offered in this interview to pay fifty cents on the dollar, but all his offers were declined. At last by promising him a safe conduct, they induced him to return with them to Detroit, where they arrived on Monday morning. On arriving they went directly to McNeil's house, where Clark had a private interview with McNeil, and then they all went together to plaintiff's house. Here Clark had an interview with plaintiff, and it was arranged they should all meet at Clark's house at nine o'clock. The

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negotiations at that time reached no result, and McDonald and Lasier having heard that threats were being made to prosecute Clark on criminal complaints, secured a hack to take him to Windsor, where he remained during the day. Towards night, however, he was prevailed upon to return to Detroit. The next morning, April 9th, a second article appeared in the *Free Press*, made up largely from information derived from the plaintiff, as is shown further on.

On the morning when this article appeared, Charles F. Clark of Boston, a brother of Gardner K. Clark, reached Detroit in response to a telegram from the creditors, and immediately had an interview with them which resulted in a settlement on the basis of paying seventy-five cents on the dollar and giving paper for the balance. Plaintiff delivered to the Clarks the certificates of deposit for $7750 on their undertaking to return to him his notes. He also promised to send them his bill, and any balance, should there be one, of money in his hands. The bill was subsequently sent in. Contained in it is a charge of $125 for services in previous litigation with Chicago parties, and $100, which plaintiff had paid J. L. Chipman as a retainer and for counsel as to Clark's criminal responsibility for drawing out the money as he did from the bank.

The third article in the *Free Press*, and the one on which the suit is grounded, was published April 16th. This is here given in full.*

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*EXHIBIT I.

An Inside View—Some Hitherto Unpublished Facts Respecting the Clark Affair—The Figure which Several Parties Cut Therein—The Movements of Clark and the Action of His Attorneys—Clark's "Misfortunes" the Biggest Kind of Grist for His Lawyer—Rather Slight Services for a Very Large Fee—$125 Gathered in for "Previous Services"—A Plain, Unvarnished Tale from which Each Reader Can Draw His Moral.

One week ago last Saturday the commercial circles of Detroit, especially in the vicinity of the board of trade building, were startled by the discovery that Gardner K. Clark, a grain operator, was missing, together with some $9700. The fact that Clark owed certain grain merchants about $11,000, coupled with the fact that he had apparently left nothing to meet his debts with, caused his creditors to have more than usual interest in his movements. Their anxiety, the discovery that Clark, together with one John Atkinson, had visited the bank and drawn the money, an account of Atkinson's sudden and early appearance on Wood-

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bridge street, where he announced himself as Clark's attorney, together with a report of several meetings between him and Clark's creditors, and of Clark's flight to and return from Hamilton and his final settlement Tuesday evening with his creditors, have all appeared in detail in the columns of the Detroit newspapers, and has likewise furnished much food for gossip and conjecture among citizens generally.

Many accepted the report contained in the newspapers as giving a full account of the disreputable affair, but others drew conclusions of a different tenor and were satisfied there was a "power behind the throne" that moved in a mysterious way. Inasmuch as the story is one in which the mercantile community especially and citizens generally are much interested, it seems necessary to relate the whole of the facts, the outlines of which have only heretofore been published. The following inside history of the case reflects no credit upon the parties of the second part, who have figured more or less prominently in the affair. It is as related by Clark and his creditors:

Friday afternoon Clark claims he was informed that certain Chicago parties were going to garnishee his (Clark's) bank account which he kept in Butler's bank. That night, or early the next morning, Clark, at the suggestion of Hal. E. McNeil, called on John Atkinson. The advice that was given to Clark by Atkinson is, of course, not positively known to any beside those two, but the subsequent visit of Clark and Atkinson on Saturday morning to the bank, and their drawing out the money, to be followed almost immediately by Clark's departure for Windsor, caused certain inferences to be drawn too obvious to require mention.

On withdrawing his money, $9,867, from the bank. Clark passed part of it to Atkinson, which, on arriving at the head of the stairs leading to Atkinson's office, was, Atkinson stated, passed back to Clark. A messenger was then, or shortly afterward, sent to the Second National Bank with a check of Gillett & Hall's for over $1000, which Clark had not deposited with his other checks Friday night. The bank refused to give the messenger the money, and he retired.

About this time holders of Clark's checks became "nervous," and the discovery that Clark had "no funds" in his bank was made. T. P. Hall, of Gillett & Hall, on this discovery, ordered the Second National to refuse payment on his check payable to Clark, if it was presented. Shortly after his departure from the bank the runner from the People's Savings Bank presented the check, which had been indorsed and deposited by John Atkinson in the People's Savings Bank, and a certificate of deposit taken therefor. On the face of this the teller wrote "payment refused" and passed it back. Clark, in the meantime, in the early forenoon, went over to Canada.

Atkinson, subsequent to his leaving, visited the board, and at a meeting of the creditors stated that he was Clark's attorney, and that Clark was in Windsor. When questioned he stated that he had no proposition to make, but would go to Windsor and see Clark and ascertain what Clark would be willing to do. The result of his interview with Clark he would make known to the creditors at 1 o'clock.

Between 12 and 1 o'clock a dispatch was received from Chief of Police Rogers, dated Chatham, stating that Clark was on the train with him bound for Toronto. This information the creditors decided to keep to themselves, as they did the discovery made by one of their number of figures in lead pencil made in a book brought by Atkinson on his first visit to the creditors, showing that some one had made a list of the creditors and figured out the sum, 25 per cent. of his indebtedness, which would be tendered in cash.

In the neighborhood of 2 o'clock Atkinson re-appeared and represented that he could not find Clark, but intimated that Clark would be willing to pay 25 per cent. in cash and the balance in notes. He informed the creditors he would go to Windsor again and see Clark, and would report

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at a meeting at five that afternoon. At or near the appointed hour he again met the creditors and stated, after considerable questioning, that he had not seen Clark, but he had received a communication from him, in which he, Clark, authorized him to offer twenty-five per cent. in cash, and the remainder in notes for three, six and nine months. Prior to this, of course, the telegram from Chief Rogers had been received, and the creditors were sufficiently apprised of Clark's movements, but their knowledge, as above noted, they kept concealed from Atkinson. Being interrogated as to the check of Gillett & Hall, which had been presented at the Second National Bank a second time with his indorsement, exhibiting the check, he in substance said: "You can see what I have done. To prevent any parties from collecting this check, should they gain possession of it, I have had written across its face 'Payment refused.'"

As above related, and as Mr. Hall informed the creditors, the teller of the Second National Bank had performed that duty through Mr. Hall's instructions, and not through Atkinson's.

At the five o'clock meeting Mr. Atkinson was very persistent in claiming that Clark did not have over $5000 to $6000 with him, and said he did not know where the remainder was unless he had spent it, or paid an overdraft. He was then informed that the "creditors" knew Clark was *en route* for Toronto.

Two of Clark's creditors, Lasier and McDonald, left Saturday night in pursuit of Clark, and succeeded in finding him at Hamilton, at 11 A. M. Sunday. Clark stated that he had less than $100 with him, and that the remainder was in Detroit. When informed that no settlement had been effected, he expressed great surprise, as he, so he stated to Lasier and McDonald, had been informed, by a dispatch from Atkinson, that "everything was working smoothly." He afterwards stated to the same creditors that he had instructed Atkinson, before leaving Detroit for Windsor, to see his creditors and offer them 25 per cent. in cash, and the remainder of his indebtedness in notes. He stated further that on getting over to Windsor he became very nervous, and was soon followed by Hal. E. McNeil, whom he claims said the creditors were making a "big fuss" over his action. About eleven o'clock Saturday forenoon Clark says he gave to Hal. E. McNeil all the money he had drawn from the bank less about $100, which he reserved to pay his expenses. This was before Atkinson met the creditors in the afternoon visits. Clark instructed McNeil to give the money to Atkinson at once, as he says, to settle immediately with his creditors.

It is quite apparent that, if McNeil did as Clark says he was instructed to do by him, Atkinson had in his possession the money which, at the meeting of the creditors later in the day, he claimed Clark had taken with him, or the $5000 or $6000 mentioned, and out of which Clark had authorized Atkinson to offer the 25 per cent. in cash. As Clark left on the noon train Saturday, he must, of necessity, have given this money to McNeil before that hour.

Clark, when found by Lasier and McDonald, showed his lack of confidence in his home representatives by offering to telegraph and have a detective shadow the man who had his creditors' money until they could get back to Detroit, a question of but a few hours' time. He also offered to give an order for it, which was declined. Clark finally consented to return to Detroit and endeavor to regain possession of his, or rather, his creditors' money. Arriving at Detroit early Monday morning the party first drove in a carriage to McNeil's residence. McNeil, when aroused, and on ascertaining that Clark had returned, showed surprise. Clark and McNeil went into an adjoining room together, and shutting the door they remained closeted for five minutes or more. What occurred is not known, but on re-appearing McNeil said he would finish dressing and would accompany them to Atkinson's residence. On arriving at Atkinson's, McNeil disappeared up stairs, and some minutes elapsed before

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Atkinson and McNeil made their appearance. Atkinson, on entering the room, drew Clark aside, and had a private conversation with him.

Clark stated to Lasier and McDonald that McNeil, in answer to his inquiries as to what he had done with the money he had requested him to take from Windsor to John Atkinson, said that he had given the entire amount to Atkinson. Clark also informed Lasier and McDonald that Atkinson claimed it was $500 short when he received it. Another meeting of the creditors was held that forenoon, but nothing was accomplished. Certain parties threatened to bring criminal prosecution against Clark, who was notified and stepped back to Windsor. Investigations then made showed that Atkinson had deposited, Saturday, in the Peoples Savings Bank, $7750, for which he had taken a certificate of deposit.

Tuesday morning Charles F. Clark, brother of Gardner K. Clark, who had been telegraphed for by the creditors, arrived, and in response to his request was met by T. P. Hall and afterwards joined by Alex. Lewis and John G. Erwin, who informed him that the creditors were unwilling to trust his brother's counsel, John Atkinson, and that if he could be got out from under his influence they thought a speedy settlement might be effected. Charles F. Clark saw his brother and interviewed Atkinson, the result of which was that a certificate of deposit for $7750 was turned over to Alex. Lewis to divide among the creditors, who held a meeting that evening at Clark's residence and agreed to accept that and a promise to pay the remainder. At the time of this meeting a messenger presented an envelope addressed to Gardner K. Clark from John Atkinson. It contained a bill for services: a copy of its most important items is appended:

GARDNER K. CLARK, *Dr.* *To* ATKINSON & ATKINSON:	
Bill for *previous* services	$125 00
Bills for services in this case, as follows:	
Retainer and services	500 00
Paid Cameron & Clearly, of Windsor	20 00
Paid McNeil	100 00
To retain Chipman	100 00
Telegrams	2 75
Total	$847 75

Deducting the amount of his bill, he acknowledged standing to Clark's credit about $180. From joint statements of Clark and the creditors, and the bill, as submitted by Atkinson, the following showing is easily deducted:

Atkinson's bill	$847 75
Amount Atkinson states there is standing to Clark's credit	180 00
Amount kept by Clark in Windsor about	100 00
Amount advanced to Clark on his return from Canada	500 00
Amount found in bank	7750 00
Total amount accounted for	$9377 75
Amount originally drawn from Butler's Bank	9867 00
Deficiency unaccounted for	$489 25

As the affair now stands, the creditors of Clark have received 75 per cent. of their claims in cash. Atkinson has received $625 for his "services." Various parties have been paid $222.75, and some one has in the neighborhood of $500, which is, as yet, not present or accounted for.

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The following day was published in the same paper a statement from Clark, and certain comments upon it, which are also here given.*

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*EXHIBIT II.

A STATEMENT FROM G. K. CLARK.

Having read the article in the *Free Press* of this morning as to my recent trouble with my creditors, I desire to make the following statement of facts, and trust that it will be the last time the public will be troubled with my private affairs.

I called upon John Atkinson at his house on Friday evening, April 5th, and told him that I was afraid my bank account would be garnisheed the next morning. and stated that if I drew my balance and closed my account that it would leave me without bank facilities, and consequently, if that step was taken, I could not take up my checks and pay cash in full. I asked him if there would be any criminal responsibility for drawing my money out so as to make a settlement with all alike. He said the money was mine, and of course I had a perfect right to withdraw it. I then told him I would withdraw it, and go away a few days to Toronto until the matter was settled. He did not advise me to go away. The next morning I met him at his office, and we went to the bank and drew the money, and at my request he carried a part to his office and then gave it back to me. I instructed him to see my creditors at once and make the proposition, which he did. Col. Atkinson said to me just before leaving: "Now, I understand that you want this matter settled;" and I answered, "That's just it."

At London I found a dispatch from him asking if he should offer fifty cents cash and the balance on time. I answered back: "Make it forty cents, or can't you make it forty cents?" or in words to that effect. On Sunday I received a dispatch from Col. Atkinson, saying that matters would probably be settled the next day all right.

When Mr. McDonald and Lasier came to me at Hamilton, I arranged with them a settlement that was satisfactory to them and they said they thought it would be satisfactory to all. I came back and first drove to McNeil's and from there to Atkinson's. The colonel told me the money was all right, and said he was glad I had made the settlement as I had, and he agreed to meet myself and a committee of my creditors at my house at 9 o'clock. He came as agreed. Mr. McDonald and Mr. Lasier came later with the refusal of my creditors to accept the terms settled upon, and they also stated that some of the creditors were going to or threatened to make me trouble. My first thought was to put myself into a position to defend myself. Col. Atkinson advised me to remain where I was, but I thought best to go to Windsor until I could prepare myself for anything they might do. I came back the same evening. Col. Atkinson accounted satisfactorily to me for what money came into his hands. I never asked any one to take less than 100 cents on the dollar for what I owe, and proposed to pay in full, dollar for dollar. It never entered my head that I was running away. I simply wanted to get away to avoid temporarily the importunity of my creditors. I telegraphed Mr. Erwin, secretary of the board of trade, that I would be in Hamilton on Sunday and Toronto Monday and be back here next week (last week.) I also telegraphed Col. Atkinson that if any one thought I was running away to disabuse their minds of such a belief. This, Super-

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The first of the articles so published in the *Free Press* was written by Mr. Goodale, the city editor. He also wrote the second, except that the plaintiff, on being applied to for information, gave it in writing instead of orally, and what he wrote was printed as a part of the editorial. The third was written by Mr. McDonald, the commercial editor, and submitted to Mr. Quinby, the managing editor, who published it after first exhibiting it to the creditors. On this point Mr. Quinby's evidence is as follows: "Mr. McDonald, the commercial editor, brought it to me, I think, on Thursday forenoon. I read it, questioned him as to the facts, and subsequently published it, after having gone to the various persons who were interested in the case." "I saw John H. Wendell at his office. I read the article to him, to his partner, and several of the so-called creditors, including Mr. Newhall and two others, I think. I read the article to them paragraph by paragraph, and asked them at the close of each paragraph whether it was correct. The

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intendent Rogers, who was on the train and with whom I chatted almost all the way to Hamilton, can verify, and also will Col. Atkinson, and, I presume, Mr. Erwin.

I have read the foregoing statement of Mr. Clark, and so far as it refers to matters within my knowledge, I know it to be true. I add this at Mr. Clark's request. JOHN ATKINSON.

REMARKS BY THE FREE PRESS.

The *Free Press* cheerfully gives place to the above unsigned communication, indorsed by Col. Atkinson, as it will to any communication designed to throw light on the transactions growing out of the Clark affair. There were certain features in the affair which, unexplained, appeared discreditable to certain parties, and any satisfactory explanation would be gladly hailed by the public for the refutation it would make of the suspicions which have gained ground. Such explanation is attempted above. As the reader will perceive, although unsigned, it comes from Gardner K. Clark. The *Free Press* had supposed yesterday afternoon that it would also have an explanation from John Atkinson, having received a note from him asking if it desired to publish the truth in the Clark affair. To this a verbal answer was returned that the *Free Press* had made an earnest effort to get at the facts in the case, and would publish any communication from him bearing on the point. None was received, however.

At nine o'clock in the evening the communication given above was handed in by G. K. Clark, who had not signed his name, though claiming the authorship of the statements therein contained. To make them doubly strong, he had had the weight of John Atkinson's name appended, and had drawn his document, or had it drawn up for him, on paper

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article was unanimously endorsed, with the exception of the Gillett & Hall check. They said they had no personal knowledge of the manner in which that had been presented. Subsequently I interviewed Mr. Hall of the firm of Gillett & Hall, in reference to that, and then to make it entirely certain I saw Mr. Davison, cashier of the Second National Bank. After that Mr. Lasier came to my office and I read it to him. He made one or two trivial corrections which I interlined at the time, and the article was published as thus interlined." He added that when he published the article he believed the statements contained therein to be true, and that he did not call upon plaintiff for information at this time, because his version had been previously given. The evidence in the case does not show who wrote the headings to the alleged libel, but Mr. Quinby testifies they were not shown by him to the creditors.

The record contains a great number of assignments of error, of which forty-one relate to the admission of evidence

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bearing the water-mark of Atkinson. Although Clark, in the above published statement, takes no direct exception to the article contained in the *Free Press* of Tuesday, there are material disagreements between what are set forth as facts in the article and in the statement of Clark.

It appears from Clark's statement that he consulted Atkinson for the purpose of ascertaining if he could draw the money to his credit in bank without incurring criminal responsibility. Satisfied on this point, he proclaimed his intention to Atkinson of withdrawing the money—nearly $10,000—and himself "withdrawing" for a few days. Clark says Atkinson did not advise him to go away. It might have occurred to some lawyers that the going away was a confession of weakness unworthy of a well-disposed, honest man; but Atkinson, if he suggested this, did not press it with sufficient force upon Clark to convince the latter of its due weight, for Saturday morning, April 5, Clark took the bull by the horns, drew the money, with Atkinson by his side, and "skipped" the town without, he says, being advised to do so.

Clark had nearly $10,000 in bank, and was anxious to settle with his Detroit creditors (having drawn the money out so that the terrible Chicago men could not get at it) and he instructed Atkinson "to see my (Clark's) creditors, and make the proposition which he did." Atkinson was at the first meeting of Clark's victims held after the discovery that Clark had "no funds" to meet the check he had given the day previous. Clark tells us that Atkinson was instructed "to make the proposition which he did." Atkinson confirms this statement. Yet at that meeting of the board Atkinson said "he had no proposition to make," and left saying he would go over to Windsor to see if he could find Clark and get a proposition from the latter. Clark's statement, indorsed by Atkinson, does not agree with this statement of Atkinson made at the first meeting of the creditors and victims. They can take either horn of the dilemma.

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against the objection of the plaintiff. To examine these in detail would be a needless task. In nearly every case the defendant seems to me to have been entitled to the evidence as of right, and in all others it was fairly admissible in the exercise of judicial discretion. The objections of the plaintiff were in the main directed to restricting the testimony to such facts in the history of Clark's performances as took place in the plaintiff's presence, and to such others as it could be shown he participated or concurred in. The chief reason urged in favor of the objections was, that the admission of proof of other facts would assume that a conspiracy was made out between Clark, McNeil and Atkinson to defraud the creditors of Clark; and that the judge did in fact assume the conspiracy in some of his rulings. But the record discloses no such assumption. The evidence was admitted because it was essential to let the jury know what the facts were in respect to which the defendant was charged with having libelled the plaintiff. The transaction described by the defendant was one occupying several days, in which several actors participated, and the successive events took place at different places, and sometimes all were actors and

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When Atkinson returned from Windsor after his alleged fruitless search for Clark he suggested that Clark would settle, and intimated that twenty-five per cent. in cash and the balance in notes would be paid.

Even then he disclaimed instructions from Clark, but even at the first meeting a sharp-eyed creditor had observed a statement in a memorandum book in Atkinson's possession showing the amount which would come to each creditor on the basis of twenty-five per cent., and in the mean time the bulk of the money had, according to Clark's own statement to some of the creditors, been conveyed to Atkinson by Hal. E. McNeil. Clark absolutely declares that he instructed Atkinson to make the proposition which he did; yet even at two o'clock there was no proposition from Clark, but Atkinson stated that he had no doubt Clark would give twenty-five per cent. in cash and the balance in notes. At five o'clock Atkinson submitted a proposition to the creditors. It was the first direct proposition made by him as coming from Clark. It was one of twenty-five cents on the dollar, cash, and the remainder in notes of three, six, and nine months. Yet Atkinson had then in his possession funds which, even after paying the large retainer and "services," realized seventy-five per cent. in cash! The honest Clark, bound to do all he could by his Detroit creditors, through Atkinson, against whose advice Clark left town, offered twenty-five per cent., or one-third what was actually realized. Atkinson at this meeting stated that he had received a communication from Clark authorizing him to make a proposition. Inasmuch as the train on which Clark went away left at twelve

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sometimes one or two only. No jury could form an intelligent opinion upon the charge unless the successive events constituting the transaction could be laid before them as a whole, and in consecutive order. To give detached facts here and there as the actual participation of the plaintiff might appear, would only serve to mystify and mislead; and it is entirely safe to say that a decision in accordance with the views advanced on the part of the plaintiff would render justification impossible in many cases where accounts have been published of transactions of public concern, and where nothing has been said that was either unjust or untrue. If there is any liberty of publication in such cases, the privilege of justification must be as broad as the liberty; and to require the several parts of the publication to be justified severally as the different actors brought separate suits, would be in effect to take away the privilege by rendering it delusive. The circuit judge evidently supposed the privilege was substantial and valuable, and he ruled for its preservation, not for its destruction. He also knew that rules of evidence were designed to elicit the truth; not to

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o'clock noon, and at two o'clock Atkinson had heard nothing from Clark —as he stated to Clark's victims—the communication must have been by telegraph.

Clark says in his statement above that he telegraphed from London to Atkinson to make the proposition forty cents, Atkinson having suggested an offer of fifty cents. If Atkinson had received this communication why did he offer twenty-five cents instead of forty cents? If he had not received this communication why did he say he had received one authorizing an offer of twenty-five cents? There seems to be a discrepancy here.

Clark says Atkinson told him that the money was all right. Clark, however, has told more than one gentleman of unquestionable veracity that Atkinson told him that the money was $500 short when he received it. The statement of Clark strongly corroborates the intimation of the *Free Press*, that large pay for slight services was given in this case. From all that appears in Clark's statement, Atkinson received $500 for the "retainer," for advising Clark that he could withdraw from bank money standing to his credit, and for appearing at several meetings of creditors, at two of which Atkinson did not, according to Clark's statement, indorsed by Atkinson, carry out the instructions of his client, so far as submitting a proposition on the authority of Clark is concerned. Perhaps Clark has had $847.75 worth of experience. If Clark has said all there is to be said in his own behalf and that of Atkinson, it is difficult to see wherein the *Free Press* statement of Tuesday needs to be corrected in the interest of that truth which Atkinson wishes spread before the public.

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suppress it; and he applied them intelligently to bringing out the facts which would enable the jury to judge whether defendant was in fault. Without all the facts before them they could not know whether the plaintiff had or had not been maligned; and all the facts were allowed to come in not on the ground of an established conspiracy, but because on a part only it was impossible for the jury to pass intelligently upon the charge on which they were sworn to return a true verdict.

Four assignments of error relate to the exclusion of evidence. In every case I think the evidence offered was plainly irrelevant. But it may not be improper to remark in this connection that we have recently had occasion in several cases to say that we cannot subject to nice and technical rules the decisions of the circuit judge on the admission and rejection of evidence, where it is apparent that he has endeavored to exercise a fair and reasonable discretion, and that no injustice has been done by his actions. *Somerville v. Richards* 37 Mich. 299; *McKeown v. Harvey* 40 Mich. 228; *Fraser v. Jennison* 42 Mich. 206; *Shipman v. Seymour* 40 Mich. 274. There are many cases in which the reception of evidence cannot be determined by inflexible rules, and the trial judge must be allowed some discretionary authority or it becomes practically impossible to bring a complicated case to a conclusion. The circuit judge does the best he can with it, but a single ruling in which the appellate court fails to agree sends it back for a new trial, and a second, third or fourth may follow if the party defeated at the circuit is ingenious enough to raise doubtful questions, until the value of the subject in controversy is eaten up with costs, and the party with whom the merits lie is forced to abandon his claim to save himself from bankruptcy. These are probable consequences of any over-nice criticism of the rulings at the circuit; and it is just as much the duty of the appellate court to see that no judgment shall be overturned on allegation of immaterial fault, as it is to award a new trial when the faults are substantial and injurious.

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The errors mainly relied upon are found in the instructions to the jury. It is not claimed, nor can it well be, that these instructions were intentionally wanting in fairness or impartiality. They were evidently prepared with care; the tone is judicial and just; no opinion is expressed or intimated on the facts, and the judge has aimed to lay down legal propositions with caution and just deliberation, and to invite from the jury an unbiased judgment upon the merits. Manifestly if he has erred it has not been because of want of careful and patient investigation. The charge as a whole, therefore, invites no criticism, and the spirit of it is so fair and just that we may be sure that any particular sentence or expression which may have seemed adverse to the plaintiff was given no exceptional and improper force through unfriendly tone or manner of the judge when uttering it.

Many of the exceptions relate to the refusal of the judge to instruct the jury that certain passages in the *Free Press* article were libellous, even though literally true, because they suggested damaging inferences, and seemed to invite unfavorable criticism of the plaintiff's conduct. For example, the article in the paper stated, on the information of Mr. Hall, that the teller of the Second National Bank had performed the duty of writing "payment refused" across the face of the Gillett & Hall check through Mr. Hall's instructions and not through the plaintiff's. From this the inference was admissible if not natural, that the plaintiff had falsified in saying or intimating that he caused this writing to be made. But it is not pretended that Mr. Hall did not do what the article said he did, and the publication in this particular was therefore strictly accurate. The question then seems to be this: Does the liability of the truth to suggest unfavorable and damaging inferences render it libellous to publish it? In *Sullings v. Shakespeare* post, p. 408, we have ruled this point in the negative. There may be exceptions, and I think there are, but the exceptions cannot embrace any case where the matter published was proper for the information of the public, as was the case here. Nor was the plaintiff shut out from any showing that would

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relieve the case from any unpleasant appearances. He was permitted to give evidence of his subsequent acts in respect to this check, and to show that he voluntarily returned it to the drawers—who had a just offset to it to the full amount—though it would have been entirely within his power to compel its payment. The judge also directed special attention to this part of the article, and while saying to the jury that he did not consider it libellous in itself, yet that they had a right to consider it with the rest, and that "if it tended to impute to the plaintiff a wilful falsehood, of course it gives a very decided character to this paragraph and perhaps to the whole article." It is not likely, in view of this instruction, that the jury overlooked the evidence put in by the plaintiff to show his own fairness in respect to the check, or that they failed to give this particular part of the article due attention.

It is next assigned for error that the judge erred in saying to the jury that it did not strike him that the statement "Atkinson has received $625 for his services" was libellous. In order rightly to understand the instructions on this point, it is necessary to copy somewhat from them:

"'Bill for *previous* services.' That word *previous* is italicized. Now it is claimed that the italicizing of it means that it is not what it purports to be; that is, previous services; as much as to say: 'Well, they may call it previous services, but we don't believe it; it is a part of this disreputable and dishonest scheme.' That is what the plaintiff claims. The declaration says: 'Meaning that there was something discreditable and dishonest in said charge and that such services had not been rendered, and that said plaintiff had made dishonest charges.' Of course if that is the meaning of it, and it means in connection with the rest of the article that Atkinson rendered a fraudulent bill, in order to cover up what had taken place, it would be libellous." Nothing could be more fair than this. Immediately following we have: "'Atkinson has received $625 for his "services,"—intending to insinuate and assert and meaning that the plaintiff's services were not legitimate and credit-

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able.' It does not strike me that that is libellous." How could it have been libellous? The fact was as stated. Is it a legitimate deduction when a lawyer receives the sum which he charges for services that there is something dishonorable in the transaction? But it is said an insinuation is conveyed by the quotation marks to the word *services*. If the fact is so it is immaterial, for the declaration makes no such claim.

It is next complained that the judge instructed the jury that the words "Clark's misfortunes the biggest kind of a grist for his lawyer" were not libellous if the jury should find that Clark assented to the payment of such fees as the plaintiff took. The words, it is said, necessarily impute something disreputable, as did the words "Beecher business" in a libel recently considered. *Bailey v. Kalamazoo Publishing Co.* 40 Mich. 251. The imputation is found in the word "grist." It must be admitted that nothing is more common than to say that the quarrels of individuals bring grists to lawyers. The meaning is that they bring business and fees, perhaps large fees. If it were said they are a rich harvest for lawyers, or a bonanza, or the "biggest kind" of a good thing, the meaning to the common understanding would be the same. A respectable and dignified counsellor would not be likely to speak of any particular business being "the biggest kind of a grist" to him, but neither would he be likely to resent very bitterly the public communication of his good fortune in this figurative language. The word "grist" is expressive, but it implies nothing wrong in the receiver. Any imputation of wrong in this case is to Clark, not to the plaintiff.

The following instruction is also complained of: "The plaintiff cannot recover damages for the publication of the following words, a part of said article: 'Their anxiety, the discovery that Clark, together with one John Atkinson, had visited the bank and drawn the money,' if the jury shall find that the plaintiff did in fact visit the bank with Clark to draw the money." The judge added to this: "Of course you are to bear in mind every time that all these paragraphs

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have a right to be considered in connection with other parts of the article. They may not be libellous in themselves, and yet they may tend to characterize and give tone to other parts." This instruction cannot possibly be erroneous unless something in the words recited from the article necessarily conveys an injurious meaning. Counsel find this in the word "one" prefixed to the plaintiff's name, which it is said is belittling, as much as to say, a person not generally known. But the jury were rightly left at liberty to judge of that.

In several other instances the judge instructed the jury that certain sentences of the article were not libellous *per se*, but were to be considered by them for their bearing upon the rest. These were cases in which the statements or expressions were not claimed to be false in fact, but only false in inference. If they were only open to unfavorable inferences, the judge disposed of them properly. *Sanderson v. Caldwell* 45 N. Y. 398. In some other cases the judge did not thus qualify his instruction. For example, he told the jury that the following words were not libellous: "On arriving at Atkinson's McNeil disappeared up stairs, and some minutes elapsed before Atkinson and McNeil made their appearance. Atkinson on entering the room drew Clark aside and had a private conversation with him." Surely the judge was right in holding that in these words nothing of a discreditable nature was imputed to the plaintiff. Standing alone the statement was as harmless as possible; if it was injurious it must have been made so by reason of other statements contained in the article. But the whole article was before the jury, and the judge took pains to instruct them that the proper deductions from the whole must be made by them.

It is further claimed that the court erred in the following charge: Reciting the passage from the declaration: "'Clark, when found by Lasier and McDonald, showed his lack of confidence in his home representatives by offering to telegraph and have a detective shadow the man who had his creditors' money until they could get back to Detroit—a question of but a few hour's time; meaning that the plain-

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tiff's client had lost confidence in him, and offered to telegraph to have him shadowed by a detective, and that the plaintiff had the creditors' money.' You have heard the comments of counsel, gentlemen, upon this particular part of the alleged libel. I think it is stated before that Atkinson must have had the money; and it is for you to say whether, taking what precedes with this particular paragraph, it was intended to assert that Clark offered to have a detective shadow Atkinson. If that was the meaning, it was libellous." The complaint of this is that the judge himself did not draw from the paragraph the inference that plaintiff, in the estimation of his client, was not to be trusted, and that it was him that Clark proposed to have shadowed. If this was a necessary deduction from the paragraph, no doubt the court should have made it. But I am not convinced it was a necessary deduction. The money was delivered by Clark to McNeil, and it does not appear from the article that Clark at the time of the interview with Lasier and McDonald had information that it had been delivered to the plaintiff. If he supposed McNeil was still retaining it, it must have been McNeil he proposed to shadow. To say plaintiff was meant, was to interpret the unexpressed idea in Clark's mind to designate a person where he had abstained from doing so; to force upon defendant a meaning injurious to the plaintiff where another was not only admissible, but was shown by the evidence of preceding and subsequent facts to have been the one had in mind at the interview spoken of.

But to take up successively the several errors alleged with a view to determine whether the judge, on the plaintiff's theory of the case, has committed any error, is in my opinion idle, because the theory itself is radically erroneous. The case was tried on the part of the plaintiff, and has been presented here, as if it involved only private considerations; as if it stood on precisely the same ground as it would have occupied if the defendant had wantonly assailed the reputation of a citizen for private faults, or if a reckless libeller had published a broadside to gratify his malice against a neighbor

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by exposing alleged vices with which the public have no concern. The plaintiff by the course he has taken with the case practically denies that any question of privilege is involved. He seeks to hold the defendant responsible for every injurious deduction that can be legitimately drawn from the article published, and when a justification is attempted, it is insisted it shall be made out with a literalness and strictness such as is demanded in the criminal law to convict one of a felony. If the plaintiff's view of the law is correct, we must concede that a libel is made out; for it is undeniable that the publication admits of inferences unfavorable to the plaintiff, and that all its statements are not shown to be literally true. But if as I think this case is one of privilege, the discussion must necessarily take higher ground, and all considerations of mere technical accuracy become irrelevant. In such a case, as I have recently taken occasion to say, the public interest is paramount to that of individuals, and it is possible that a person whose character and actions are impugned may suffer without remedy when in fact he is free from just blame. *Foster v. Scripps* 39 Mich. 376, 383. We may deplore such a result without in the particular case being able to prevent it. Incidental injuries are inseparable from the exercise of rights. If the law should require every man to indemnify others for all injuries resulting from his doing those acts which are his lawful right, it would by this very penalty strip him of some which are most important and vital, by rendering them practically valueless. But there is no such requirement. Every man must exercise his rights with due regard to the corresponding and coincident rights of others, and he is responsible if he causes injury through malice or negligence, but not otherwise. This is as true of the right to free speech as it is of the right to the free enjoyment of one's property.

What is a case of privilege? In general terms it may be said to be a case in which the circumstances rebut the presumption of legal malice. By legal malice is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice

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in fact. *Wason v. Walter* L. R. 4 Q. B. 73, 87. If one traduce another, whether knowing him or not, and whether intending to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether injury was intended or not, and if there was no excuse for the slander, there should be an appropriate remedy. *Bromage v. Prosser* 4 B & C. 247, 255. But the presumption of law may be rebutted by the circumstances under which the defamatory words have been uttered or published; and whenever this is the case no right of action can arise, even though the character of the party concerned may have suffered, unless he is able to show that there was malice in fact. *Wason v. Walter* L. R. 4 Q. B. 73, 87; *Toogood v. Spyring* 1 C. M. & R. 181; *Lewis v. Levy* El. Bl. & El. 537; *Taylor v. Hawkins* 16 Q. B. 308, 321; *Clark v. Molyneux* L. R. 3 Q. B. Div. 237. *Barrows v. Bell* 7 Gray 301; *Terry v. Fellows* 21 La. Ann. 375; *McBee v. Fulton* 47 Md. 403.

The privilege in a communication springs from the fact that there existed in the case some obligation or duty to speak or publish on the subject. Sometimes this obligation is mandatory; the duty is either imposed by law, or the circumstances render it so far imperative that the party upon whom it rests must suffer some penalty or loss unless he recognizes and performs it. In such cases the protection should be as conclusive as the duty is imperative. We have an illustration in the case of a witness in court: the law compels him to state what he knows that is relevant and competent in the controversy, and he will not be suffered to refuse if he would. But the conflicts in testimony give abundant evidence that witnesses are frequently mistaken; and if they must testify under a responsibility to civil suits for all mistakes injurious to the reputation of other persons, we should encounter such evasions of process and such suppression of the facts as would in many cases make the truth practically unattainable. In a civil suit against the witness, therefore, the law will not permit malice to be alleged or shown: if the witness testify falsely with evil intent, he

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may be indicted and punished; but in a civil suit which brings it in question, his evidence must be conclusively presumed to have been given under the inspiration of proper motives. The same conclusive presumption will attend the filing of the necessary pleadings and other papers in a cause, and the arguments of counsel, provided they do not wander from the case for the purposes of vituperation or harmful imputation upon character, conduct or motives. *Torrey v. Field* 10 Vt. 353; *Gilbert v. People* 1 Denio 41; *Hoar v. Wood* 3 Met. 193; *Strauss v. Meyer* 48 Ill. 386; *Johnson v. Brown* 13 W. Va. 71. But there are other cases in which the privilege is only *prima facie* and conditional; it exists so far as to rebut any legal presumption of malice, and constitutes a protection until actual malice is shown. It is therefore a privilege conditioned on the publication having been made with proper motives, but the proof of bad motives—or in other words, of malice in fact—must be made by the party who asserts it: *Spill v. Maule* L. R. 4 Ex. 232; *Shurtleff v. Stevens* 51 Vt. 501. Such a case is where a voter publicly criticises and condemns the character or conduct of a candidate for public honors: he has a right to do this, and is *prima facie* protected in his criticism; but if it is made to appear that his privilege is used as a cloak for groundless and malicious assaults the protection ceases because the reason on which it rests ceases. The privilege is the handmaid of good faith.

In the cases of qualified privilege the duty to speak or publish is not imperative in the sense that a law is violated if it is not recognized; it may be a moral or social duty of imperfect obligation. Lord Campbell, Ch. J., in *Harrison v. Bush* 5 E. & B. 344. Indeed most cases of conditional privilege are cases in which a party may speak or abstain at his option; and if he speaks, it is because others desire and have a right to receive information on some subject which specially concerns them, or because in his opinion some moral, social or political obligation demands it. The law imposes upon no citizen the duty to call the attention of the public to the mal-administration of public affairs, or to the

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misconduct of public servants; but good citizenship may require him to speak, if his real motive in doing so is to bring about a reform of abuses, or to defeat the re-election or re-appointment of an incompetent officer. *Palmer v. Concord* 48 N. H. 211, 216. And nothing is plainer than that to hold him to the strict and literal truth of every statement, recital and possible inference, would be to subject the right to conditions making any attempt at public discussion practically worthless. Lord Campbell has well shown in *Harrison v. Bush* 5 El. & Bl. 344, and especially by his reference to the cases of *Rex v. Baillie* 21 State Trials 1, and *Fairman v. Ives* 5 B. & Ald. 642, that the law cherishes this right, and regards liberally its exercise for the public good, so that an honest mistake in seeking the proper remedy through the publication will not be suffered to constitute a ground for recovery. Chief Justice Parker thus states the true rule in *State v. Burnham* 9 N. H. 34, 41: "If the end to be attained is justifiable; as, if the object is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or, generally, to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful, and the party may then justify or excuse the publication." Still more comprehensive is the language of the trial judge in *Kelly v. Sherlock* L. R. 1 Q. B. 686, 689: "Every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury—we are all of us the subjects for public discussion. So also is it matter of public interest, the dispute between the plaintiff [a clergyman] and his organist, and the way in which the church is used: they are all public matters, and may be publicly discussed. And, provided a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position ren-

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ders himself open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position. In this country, everything, either by speech or writing, may be discussed for the benefit of the public." This strong language is approved in *Kelly v. Tinling* L. R. 1 Q. B. 699; and in *Henwood v. Harrison* L. R. 7 C. P. 606, 622, the principle is declared to be "a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals." The same principle is found in *Toogood v. Spyring* 1 C. M. & R. 181; *Whiteley v. Adams* 15 C. B. (N. S.) 417; *Gott v. Pulsifer* 122 Mass. 235; *McBee v. Fulton* 47 Md. 403; *Shurtleff v. Stevens* 51 Vt. 501.

Is the case before us within the principle? The facts, briefly recapitulated, are these: A member of the board of trade of the principal commercial city of the State, after having in the course of a day's business put in circulation a considerable number of checks, sought the plaintiff for advice whether he would be liable to a criminal prosecution if he should withdraw the money then in bank to his credit and take himself out of the country. The pretences for this were that he was in fear of garnishment by distant parties; that his deposit was not quite equal to his checks, and that he owed moneys to his wife. The transaction had a dishonest appearance, which evidently the plaintiff recognized. He would not advise his client to go away, but the latter nevertheless determined to go. They went together the next morning and drew the money before the checks, in the regular course of business, would be presented. The plaintiff was made to believe by his client that he was withdrawing his money in order to be in position to effect a fair compromise with his creditors; but the relation of confidence existing between him and his client no doubt inclined him to a more charitable view of the client's acts

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and motives than could have been taken by any dispassionate observer not thus situated. To any disinterested business man the transaction would have been more than suspicious: it did not need the light of subsequent events to demonstrate an intended fraud. The client acted with the money after he had received it as if he knew he was running off with that which justly belonged to others; and when he caused notes to be made to his wife for amounts greatly beyond his pretended debt to her, the most favorable view that could be taken of his conduct would be that he made this disposition of his means in order to force upon his creditors such a compromise as he saw fit to dictate. The plaintiff would not undertake to justify such conduct. In morals a compromise thus forced upon a creditor is in the same category with any forcible deprivation of property.

There is no room for plausible suggestion that these matters were not of public concern. The Detroit board of trade is a public institution, in the sense that it challenges public confidence by giving assurances that it is composed of individuals whose business integrity is known and undoubted. The public had reason to trust and confide in Clark, because he had been accepted as a suitable and proper member of this body; and reason is found in this record for the belief that his associates trusted him because he had won their confidence, and not because of any actual responsibility. It is as important to the city of Detroit that it should have an honorable and trustworthy board of trade — a board that would reject and spurn association with one known or believed to be unreliable and dishonest, — as it is that it should have trustworthy mayor or controller, or police authorities or other public functionaries. The business prosperity of a commercial city must depend quite as largely upon the honor and integrity of its commercial classes as upon the character of its political rulers; and confidence in these must cease unless fraud, when it appears, can be publicly rebuked.

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The defendant is publisher of a daily journal, established to give the facts of important current events, and to discuss, for the information and instruction of its readers, public affairs. This case affords neither occasion nor excuse for any general discussion of the liberty of the press in giving news: what was done here might have been done by any individual in a pamphlet under the same privilege that protects a newspaper. Nor has the fact that the liberty of the press is frequently and most grossly abused any relevancy in this case; we are concerned only with the question whether the liberty of public discussion was abused in the particular case. The conductors of the defendant's paper, in the regular course of their business, had had brought to their attention the facts of a transaction which no one ventures to defend. This transaction in its direct consequences was calculated to defraud a number of persons of considerable sums of money; in its indirect consequences it was likely to disturb the prevailing confidence in an important public institution, and to injure the business reputation of the city. They investigated the case, and laid the results before the public. No doubt they might have used more carefully-guarded language, and avoided irritating head lines; but in a case of palpable fraud, which this seemed to be and was, something must be excused to honest indignation; for the beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference. It is complained that the paper followed its first publications with a review of the whole case a week after it was all settled; but this review was quite as proper as the first notice. No settlement could relieve the case of its worst aspects. If Clark had repented before he left Windsor, and had followed his money in its remarkable journey, by hack and sail-boat, on foot and in carriage, and recovered it for the use of his creditors, he ought still to have been brought to the bar of public opinion to be dealt with for his extraordinary conduct, whereby a considerable

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percentage of his assets had already been wasted. *Mott v. Dawson* 46 Iowa 533. The defendant's paper would have been unworthy of the confidence and support of commercial men if its conductors had shut their eyes to such a transaction. If the plaintiff was not in fault, then it was his misfortune that it was impossible to deal with the case without bringing him into the discussion.

The communication in this case being privileged, and there being in its terms no manifest abuse of the privilege, it was incumbent on the plaintiff to give some evidence of malice before he was entitled to ask a verdict in his favor. *Taylor v. Hawkins* 16 Q. B. 308, 321; *Henwood v. Harrison* L. R. 7 C. B. 606. The case therefore failed to be made out. If such a discussion of a matter of public interest were *prima facie* an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening and may at any time be ruinous. A caution in advance after despotic methods would be less objectionable than a caution in damages after in good faith the privilege had been exercised. No public discussion of important matters involving the conduct and motives of individuals could possibly be at the same time valuable and safe under the rules for which the plaintiff contends. It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him, and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free. Impose shackles upon it and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his

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victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty also that is least liable to suffer serious injury when the discussion incidentally affects it unjustly.

When it is said that malice must be shown in the case of privileged communications, the term "malice" is used in its legal, not in its popular sense. It is legal malice if one publishes as true what he knows to be false, or what by proper investigation he might have assured himself was false. The man who deals recklessly with the reputation of others is as justly charged with legal malice as the man who recklessly destroys their property; and the recklessness may be made so apparent by the violent and intemperate language of a communication as to require no further evidence. *Rearick v. Wilcox* 81 Ill. 77; *Pittock v. O'Niell* 63 Penn. St. 253. But the case must be very clear to justify the court in a conclusion of malice before the extrinsic facts are shown.

In what I say in this case I advance no new doctrines, but justify every statement of principle on approved authorities. It will be freely admitted that there are decided cases from which a different argument may be constructed, but it is affirmed that they are no longer deserving of credit if they ever were. The gradual and beneficial modification of the law of libel is shown in *Wason v. Walter* L. R. 4 Q. B. 73, and in so far as it has been modified it has been made more consistent with just reason. While it is admitted that the public press is often corrupt and often reckless in dealing with private reputations, it is at the same time affirmed that the duty of its conductors to abstain from such misconduct is no plainer than is the obligation of the authorities to refuse to impose penalties when in the exercise of a just independence they make use of their columns for the exposure of public wrong-doers to public condemnation. The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretence of liberty, and then punishing them in damages if they act upon the assumption that the liberty is genuine.

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In what is said in this opinion no imputation upon the private or professional character of the plaintiff is made or intended. The opinion rests upon the conclusion that the defendant in making the publication which is the subject of the suit was exercising an undoubted privilege and performing a plain duty. I cannot participate in taking away the privilege, either directly by denying its existence, or indirectly by refusing to permit the facts to be shown on which its exercise is justified. Perhaps the privilege would have seemed to stand out more boldly and appeared more sacred if the provisions deliberately incorporated for its protection and perpetuation in every American constitution had been collated and given prominence, but it is enough for me to find it embodied in the good sense of the common law, where it has constituted one of the most important elements in the beneficent growth and progress of free States.

I think the judgment should be affirmed.

JACOB BREINING, ADM'R v. DOROTHEA SCHNEIDER.

Settlement of estates—Administrator's claim for indemnity.

An administrator filed a bill for indemnity from the estate, or from the widow and heirs, alleging that by the advice of the judge of probate he had turned the property over to the widow and heirs, believing that they would take care of debts remaining unpaid; that he had received his discharge but was afterwards cited to show why a particular claim had not been paid; that the judge of probate decided that the estate could not be re-opened and he must resort to equity; and that he had himself paid the claim. *Held*, that the administrator had disregarded the statutory provisions governing the management of estates, and that the case was not within any head of equity; and the bill was dismissed.

Appeal from Washtenaw. Submitted June 15. Decided June 29.

BILL to compel widow and heirs to indemnify the administrator for paying a claim against the estate. Dismissed on demurrer. Affirmed.

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Cramer, Frueauff & Corbin for complainant.

Lawrence & Emerick for defendant. The opening of a final administration account after allowance is a fraud on creditors of the estate: *Jennison v. Hapgood* 7 Pick. 7; *Paine v. Stone* 10 Pick. 76; *Field v. Hitchcock* 14 Pick. 406; *Saxton v. Chamberlain* 6 Pick. 426; *Davis v. Coodin* 20 Pick. 512; *Sever v. Russell* 4 Cush. 517; the probate court is the proper tribunal in which to settle matters in relation to an administrator's account, etc.: *Holbrook v. Campau* 22 Mich. 288; *Patton v. Bostwick* 39 Mich. 218; *Kellogg v. Aldrich* id. 577; *Green v. Probate Judge* 40 Mich. 244; *In re Rathbone's Estate* 44 Mich. 57; *Shelden v. Walbridge* id. 251; a bill of discovery does not lie in Michigan: *Riopelle v. Doellner* 26 Mich. 105.

GRAVES, J. This is a cause in chancery. The hearing below was on demurrer and the bill was dismissed for want of equity. The suit is a manifest experiment and the matters relied on to bring a court of equity to assume cognizance are so peculiar that no abridgement can succeed in presenting the case in the exact light in which it appears in the record. But the bill is too long to be repeated and a brief reference must suffice.

Complainant alleges his appointment as administrator in 1873, with the approbation of the widow and heirs, and the various steps taken to settle the estate. That certain lands were sold by him under license of the probate court and certain personal assets disposed of; but that certain personal estate and one hundred and fifty-seven acres of land remained. That the widow and children desired that no more property should be disposed of; although a claim allowed by the commissioners in favor of John Schneider and amounting to $1336.62 was still unpaid. That in this state of things it was agreed between complainant and the judge of probate and the widow and children that no more of the estate should be sold, and that the probate court should pass the administration account of complainant and assign the property to the widow and heirs, and that the

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same was done in December, 1875. That by the advice of the judge of probate complainant turned over the property to the widow and heirs, and did so with the full belief on his part "that said widow and the heirs at law would take care of the balance of the debts and especially this debt to John Schneider (which in fact had not been paid) as they agreed to do and as (complainant) is advised and believes they were equitably bound to do." That in October, 1878, he was cited to show cause why Schneider's claim had not been paid, and, on the hearing, the present judge of probate held that the estate could not be opened and that complainant "must go into the court of chancery to get his claims." That he then paid the Schneider claim and proceeded to institute this suit in order to obtain indemnity out of the estate or against the widow and heirs.

It is scarcely necessary to say more than that the statements in the bill do not amount to a cause of action in chancery. Complainant's counsel have not succeeded in suggesting any head of equity to which it would be possible to assign the case which is set out, and we are satisfied there is none. According to the explanation given by complainant there is no doubt that the judge of probate might have opened the administration at the time complainant was cited for not having paid the Schneider claim. Yet as he did not press his application, and by appeal, if necessary, insist on the remedy which was then practicable, but proceeded to pay and satisfy the claim against the estate out of his own pocket, and thereby altered his position and assumed a new character, namely, that of a personal creditor, or a mere volunteer, I am not satisfied that any remedy remains. In any event it is quite certain that there is no ground for equitable interference on the facts in this record.

The decree must be affirmed with costs.

MARSTON, C. J. and CAMPBELL, J. concurred.

COOLEY, J. If the complainant finds himself in such a position that he must lose the large sum he paid in satisfaction of the claim of John Schneider, it must be attributed

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to his disregard of the law. It often happens that parties are wronged under such circumstances, but if they will not regard the law, they cannot be protected in their interests by it.

Complainant shows by his bill that as administrator of John F. Schneider he had in his hands abundant means to pay all the debts. Instead of paying John Schneider's debt, however, which had been proved and allowed, he saw fit to enter into some understanding with the widow and heirs whereby he rendered a final account which assumed that all the debts were paid, and obtained his final discharge, on turning over the property to the family. A part of the heirs were minors, and of course no understanding they may have entered into could be binding upon them. But of course the whole arrangement was unwarranted and illegal, and the natural result followed that when John Schneider called for the payment of his claim the court cited complainant to show cause why he had not paid it.

On complainant paying this claim in response to this citation, I should be inclined to think he might stand in the shoes of John Schneider, and claim the benefit of such remedies as were open to him, were it not for one fact which is stated by him, and which apparently deprives the case of all equity. It appears by the bill that complainant sold real estate subject to existing mortgages, and took for $3500, the purchase price, a mortgage on the land sold. What possible excuse he could have had for thus exposing the whole purchase price to the risks of the prior mortgages we are not informed: the judge of probate must have been deceived in relation to it or he would never have confirmed the sale. The bill avers that the mortgage proved to be worthless; so that whatever might have been realized to the estate by a proper sale was lost to it. The bill therefore on its face shows culpable disregard of duty, whereby a considerable sum was lost to the estate; and as this is more than the claim complainant paid for the estate, he could, under no circumstances, be entitled to relief on the case made. It seems probable from the statements in the bill that all par-

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ties concerned participated in the disregard of law; and if so, they should not complain if the law leaves them where they have put themselves. It may be that the widow and heirs ought to save complainant harmless, but there is, as I think, no law compelling it.

The other Justices concurred.

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BENAIAH A. THARP v. HARRIET ALLEN.

Tenant in common—Partition—Lessee's interest—Homestead exemption—Deed covers buildings—Validity of judgment put in evidence.

A court's conclusion of fact in favor of the validity of a judgment introduced in evidence, cannot be reviewed if there are no facts or exceptions which would raise a doubt on the subject.

Buildings are presumed to go with the land in the absence of proof to the contrary.

A tenant in common cannot have, as such, any peculiar interest in any specific portion of the entire tract held in common; and his possession is subject to the incidents of partition whatever the portion that may be thereby set off to him.

Whatever a tenant in common takes by partition he takes practically as a purchaser from the aggregate tenancies.

A son who goes upon his father's land with the father's consent, and occupies a building already there, but who takes and holds possession under no claim of enjoyment that would create a homestead interest, and after his father's death pays rent to the representative of the estate, is merely a lessee, so far as his exclusive possession is concerned.

A lessee can convey his interest as such without his wife's consent.

The homestead exemption from execution is an exemption of an entirety, though a homestead may also be claimed in lands held in joint tenancy and not exceeding the homestead limitation in quantity.

Case made after judgment. Submitted June 16. Decided June 29.

EJECTMENT. Plaintiff had judgment below. Affirmed.

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Howell & Carr and *Spafford Tryon* for plaintiff. A mere tenant in common can have no exclusive right in any specific portion of the land, and can therefore have no homestead therein: *People v. Plumsted* 2 Mich. 465; *Amphlett v. Hibbard* 29 Mich. 298; *West v. Ward* 26 Wis. 579; *Thurston v. Maddocks* 6 Allen 427; mere possession and use as a homestead do not give a homestead right: *Calderwood v. Tevis* 23 Cal. 335; *McClurken v. McClurken* 46 Ill. 327; an heir cannot acquire homestead rights in a portion of his ancestor's premises until partition has been had: *Wisner v. Farnham* 2 Mich. 472; *Herschfeldt v. George* 6 Mich. 469; *Seaton v. Son* 32 Cal. 481; *Reynolds v. Pixley* 6 Cal. 481.

Harsen D. Smith for defendant. An heir who is entitled to a share of real estate by partition is entitled to a homestead therein to the extent of his interest: *Lozo v. Sutherland* 38 Mich. 168; *Sherrid v. Southwick* 43 Mich. 515; a dwelling house built on land with the owner's consent and without any contract of purchase is personalty: *Wells v. Banister* 4 Mass. 514; *Osgood v. Howard* 6 Greenl. 452; *Barnes v. Barnes* 6 Vt. 388; *Fuller v. Tabor* 39 Me. 519; *Dame v. Dame* 38 N. H. 429; *Mills v. Redick* 1 Neb. 437; *Weathersby v. Sleeper* 42 Miss. 732; Cooley on Torts 429.

CAMPBELL, J. This is an action of ejectment, in which the court below found in favor of plaintiff and gave judgment accordingly. No exceptions were taken to the finding, and the errors assigned are all aimed at its sufficiency. The only objection which seems to have been brought to the attention of the court below relates to the alleged homestead right of defendant.

Defendant is wife of John Allen, who is still living, but not on the premises. He is the son of Green Allen, who died in 1879, leaving nine children who are his heirs at law. He owned a tract of land, including the premises in controversy and containing 470 acres. The land in controversy contains forty acres.

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During his life he let John Allen go upon it and occupy a dwelling which had been before erected by them jointly, John paying rent some years and other years not paying, and the father paying taxes and cutting timber from the land. During John's occupancy he put up some outbuildings and made some other improvements. There was no agreement made about the buildings. After his father's death John paid rent to the administrator, and subsequently sold his interest in the whole estate, as tenant in common, to plaintiff. Dower was assigned to the widow of Green Allen, and partition was made in the probate court of the estate among the co-tenants. Plaintiff got as his portion the land in controversy, subject, however, to payment to the co-tenants, which he made, of $478.76, for equality of partition. Defendant did not sign her husband's deed, and did not leave when he did. The land is within the homestead value.

The only question which seems by the finding to have been presented to the court below, and put in shape for revision in this court, is that of the defendant's right of homestead. There is nothing in the finding indicating that the partition was invalid, as it was within the scope of the statutes; and in the absence of any facts or exceptions which would raise a doubt on the subject, we cannot review the conclusion of fact which the court below adopted. It must be assumed that when that court finds the conclusion that a judgment in partition passed the title, there was a valid judgment. If the defendant had any objections to the evidence of such a judgment there should have been exceptions taken, so that the facts might appear. No intimation is given of actual insufficiency, but we are asked to presume against the finding. This we cannot do.

Neither is there anything in the record indicating that John Allen should be a party. He does not claim any right, and is out of possession.

Having found general title in plaintiff and withholding by defendant against that title, there could be no finding by the court in her favor unless upon the determination of such

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facts as would establish a valid homestead. And we think the court below was right in finding that none had been made out.

There is no right found in the dwelling itself, which was built before John Allen became a tenant, and which presumptively goes with the land in the absence of proof to the contrary, and there is no such finding, and it appears there was no such proof.

It appears affirmatively that John Allen neither took nor held possession under any claim or enjoyment, express or implied, which would create a homestead interest. He went on as his father's tenant, and even as such tenant his occupancy was concurrent with his father's exercise of acts of ownership involving entry on the land and removal of timber. No change of kind or character of tenancy was made after his father's death, but he continued to pay rent to the representative of the estate. He claimed no separate ownership in this parcel as distinct from the rest of the inheritance, and never undertook as heir to assert any sole possession, but did directly the contrary.

The case indicates that he acted on the legal and correct theory that a tenant in common as such can have no peculiar interest in any specific portion of an entire tract, and his possession was subject to the incidents of partition which may or may not set apart to him one portion rather than another. Whatever portion he takes, he takes practically as a purchaser from the aggregate tenancies. *Campau v. Barnard* 25 Mich. 381.

Allen, therefore, never had any interest in this parcel different from what he had in the rest, and his possession as a co-tenant was a possession of the whole tract on the same terms, and subject to the incidents of partition. The only exclusive possession he ever had was as lessee and not as owner, and such a right he could lawfully convey without his wife's consent, inasmuch as he had no title to the dwelling and is not found to have claimed to own it.

The constitutional exemption, as has been decided, is confined to an entirety. *Amphlett v. Hibbard* 29 Mich. 298.

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We have given the statutes a somewhat broader interpretation, where there was a tenancy in common of a tract confined to the homestead quantity and claimed as a homestead. *Sherrid v. Southwick* 43 Mich. 515; *Lozo v. Sutherland* 38 Mich. 168. But where, as in the present case, there was not even a claim of that kind by the tenant, but there was a distinctly inconsistent holding, there is no room for the application of the law of homestead.

The judgment must be affirmed with costs, and the case remanded.

The other Justices concurred.

ALAMANSON M. MATTESON v. JOHN R. BLACKMER, STEPHEN W. DUNCOMBE, ADMINISTRATOR, ET AL.

Mortgage—Proof of delivery—Loan agent—Bonus on loan—Notice of prior lien—Land-poor—Affirmance of decree in doubtful cases.

Where a mortgager testifies in general terms that he *gave* the mortgage at a specified time, and is not questioned as to the particulars of delivery, this testimony must be regarded as showing *delivery* at that time.

A complainant in foreclosure desired to show that the mortgage held by him was delivered and recorded before another one of previous date held by a person who had died before the suit was begun; and he sought to show it by the testimony of a witness who claimed the decedent had told him his mortgage was neither acknowledged nor delivered until the other was put on record. The witness had lived five or six miles from decedent, and was not shown to have been his confidant. Complainant had a mortgage on the lands of the witness. *Held* a suspicious circumstance that he had never mentioned his conversation with decedent in the latter's lifetime, nor until after complainant's suit had been pending seven years, and until complainant had called upon him, just before he was sworn, to know if he was possessed of valuable information.

Where a son acts for his father in procuring a mortgage, undertakes the whole negotiation, decides upon the security, satisfies himself as to the title, attends to the execution of the papers, receives the money from his father and pays it over to the mortgager,—in short does every thing an agent could do, and his father accepts the benefits of the transaction, he may properly be regarded as his father's agent in spite

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of his testimony to the contrary, especially if he admits being his agent just before and just after these acts; it is idle under such circumstances for him to claim to have been agent for the person giving the mortgage.

Extortion of a *bonus* from the borrower of money is too common a procedure on the part of the lender's agent, to be very significant for the purpose of showing that he was the borrower's agent rather than the lender's.

The fact that the value of land is not enough to secure two loans is significant, but not conclusive, evidence that the second mortgagee had notice of the prior lien.

"Land-poor" is understood to mean that one has a great deal of unproductive land, and perhaps that he has to borrow money to pay taxes. But a man land-poor may still be responsible.

A decree may be affirmed where the appellate court is not satisfied that the trial judge was in error in his findings as to the preponderance of testimony.

Appeal from Van Buren. Submitted June 17. Decided June 29.

Bill of foreclosure. Complainant appeals. Affirmed.

Dallas Boudeman for complainant.

Benjamin F. Heckert for defendant Duncombe. When the mortgager and mortgagee have the same agent his knowledge is notice to both: 1 Jones Mortgages § 588; *Losey v. Simpson* 11 N. J. Eq. 246; *Astor v. Wells* 4 Wheat. 466; *Jamison v. Gjemenson* 10 Wis. 411; delivery of a mortgage in an incomplete condition is good at common law and subsequent mortgagees will be bound by notice thereof: *Reynolds v. Darling* 42 Barb. 418; *Van Court v. Moore* 26 Mo. 92; *Thompson v. Leach* 2 Vent. 200; *Hammond v. Warfield* 2 Har. & J. 151: 15 Amer. Dec. 246.

Cooley, J. This is a bill to foreclose a mortgage given by the defendant John R. Blackmer and his wife to the complainant, bearing date February 17, 1869, and recorded in March following. Stephen W. Duncombe as administrator of the estate of Hezekiah Selleck deceased, is joined as a defendant under the general allegation that said Selleck

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was a subsequent encumbrancer. No contest is made respecting the mortgage held by complainant, and the litigation has concerned the Selleck mortgage exclusively. That mortgage bears date January 13, 1868, but was neither acknowledged nor recorded until after the recording of the Matteson mortgage. It is claimed by Duncombe, however, that the Selleck mortgage was made and delivered at the time of its date, and that complainant, through Milo D. Matteson his agent, was notified of its existence when the mortgage in suit was taken.

The points contested in this case are—*First*, whether the Selleck mortgage was made and delivered before the Matteson mortgage; *second*, whether Milo D. Matteson was the agent of complainant in taking the mortgage now in suit; and *third*, whether, if he was agent, he had notice of the existence of the Selleck mortgage when negotiating for and receiving the other.

On the first point the testimony of the mortgagor is positive that the Selleck mortgage was given when it bears date. On the evidence there seems to be no ground for questioning the fact of its being then made, upon a consideration of money previously loaned. What is disputed is, that it was then delivered. Blackmer testifies that it was handed to a notary to take into the country, where he resided, in order to have his wife sign and acknowledge it, but that this was delayed a long time, until finally it became necessary to employ another. Complainant's counsel insists that there is no evidence of the delivery of this mortgage until the time of acknowledgment; and it is true that Blackmer does not expressly testify that he delivered it. He however testifies in general terms to giving the mortgage to Selleck in January, 1868, and as neither party saw fit to question him respecting the particulars of delivery, this must be deemed sufficient. An attempt is made to overcome his testimony by that of one Coneley, who swears to having been told by Selleck in 1869 or 1870 that Blackmer had given him a mortgage, but never acknowledged nor delivered it "until the other mortgage was given and put on record." It is a very suspicious

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circumstance that the witness never mentioned this conversation to any one in the life-time of Selleck, nor until after this suit had been pending for seven years, nor until Milo D. Matteson called upon him just before he was sworn to ascertain if he was possessed of valuable information. Why Matteson should direct the inquiry to him does not appear. Coneley lived five or six miles from Selleck in the life-time of the latter, and no circumstance is stated that would have been likely to make him the confidant of Selleck. We do not place much reliance on this evidence, especially as Matteson appears to have a mortgage on the lands of the witness. We do not think it overcomes the testimony of Blackmer.

That Milo D. Matteson was not the agent of complainant in taking the mortgage in suit is sworn to positively by him, but nevertheless we think his testimony establishes the fact. The complainant is his father, and Milo swears that he was his father's agent in the business of loaning money until a short time before this mortgage was taken. His father was boarding him for what service he rendered, and he refused to work longer without better compensation. Nevertheless he took up the work again almost immediately after this mortgage was taken; so that he was indisputably the agent just before and just after the transaction. In this transaction he claims to have been agent for Mr. Blackmer in obtaining a loan for him; but giving full effect to all his statements of fact, it is perfectly evident he was agent for his father in this matter as much as at other times. It may be that he was not under pay at the time; but if so he performed a voluntary service of which his father accepted the benefit. Milo took upon himself the whole negotiation, decided upon the security, satisfied himself respecting the title, attended to the execution of the papers, received the money from his father and paid it over to Blackmer; in short did everything there was for an agent to do in the matter, and as much as any agent could ever have done in a similar negotiation. Complainant never appeared in the transaction at all, except as he handed over the money to Milo; and it is idle for Milo to testify that under such cir-

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cumstances he was agent for Blackmer. It is true he succeeded in extorting from Blackmer a large bonus; but that has been altogether too common a procedure for the agents of money lenders to have significance on this question.

On the question of notice of the other mortgage Blackmer and Milo D. Matteson contradict each other. Complainant insists that Milo's testimony is most credible, because the value of the land at the time was scarcely sufficient to secure both debts. This is a circumstance deserving attention; but it is not conclusive. Blackmer gave a note with the mortgage, and it does not appear he was considered irresponsible. Milo says Blackmer "had a good many pieces of land: he was land-poor." By this is generally understood that a man has a great deal of unproductive land, and perhaps is obliged to borrow money to pay taxes; but a man "land-poor" may be largely responsible. It is noticeable that this record shows no negotiation in respect to the land to be pledged; and we find nothing to indicate that the personal responsibility was not considered the chief reliance. But without discussing the evidence it is sufficient to say that the circuit judge found a preponderance of testimony in favor of the notice; and we are not satisfied that he was in error. The decree, which postponed the mortgage of complainant to that given to Selleck, will therefore be affirmed with costs.

The other Justices concurred.

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FIRST NATIONAL BANK OF KALAMAZOO v. JOHN J. McALLISTER ET AL.

Bill in aid of execution—Right of grantee—Extinguishment of parol interest—Conveyance to wife to cancel debt—Suppression of deed—Levy on lands—Estoppel—Priority of record.

Where a bill in aid of execution is filed to reach land which has been previously conveyed without fraudulent intent, the grantee's right must be determined by the original nature of the transactions, and cannot be made to depend on later dealings with other lands which are not involved in the litigation.

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An interest that rests in parol may be extinguished by parol.

A purchaser of land was in debt to his wife to an amount exceeding the purchase money, and as she desired security, he returned his deed to the grantor and had another executed directly to her. She afterward wished to buy the land outright, and gave up to her husband the evidences of his debt. *Held*, that as between them the transaction could be upheld as a sale; the cancelling of the debt was a complete payment of consideration.

One who has deliberately obtained an apparently legal transfer of land with intent to have the legal title placed in some one else, and that for good reasons, and without fraud or deceit being practiced on him, cannot afterwards assail the transfer by parol evidence and show a former deed to himself which he had suppressed, without recording, in order to have the land reconveyed.

Judgment creditors levying upon land that has been previously conveyed in good faith on both sides, obtain by their levy no better title than is held by the debtor.

Title to land cannot pass by a mere estoppel shown by parol; neither can an apparent title be assailed by the parol evidence of one who has caused its transfer.

The presumption in favor of one who holds the earliest recorded title, cannot be destroyed without proof of an earlier right based on superior equities.

Appeal from St. Joseph. Submitted June 17-21. Decided June 29.

Bill in aid of execution. Both parties appeal. Reversed; bill dismissed.

Germain H. Mason and *Henry F. Severens* for complainant. Destruction of a deed does not re-vest title: *Ward v. Lumley* 5 H. & N. 87; *Gilbert v. Bulkley* 5 Conn. 262; *Conway v. Deerfield* 11 Mass. 332; *Holbrook v. Tirrell* 9 Pick. 108; *Steel v. Steel* 4 Allen 422; *Wilson v. Hill* 2 Beas. 143; *Patterson v. Yeaton* 47 Me. 308; *Fawcetts v. Kimmey* 33 Ala. 264; *Kearsing v. Kilian* 18 Cal. 491; *Holmes v. Trout* 7 Pet. 171; *Botsford v. Morehouse* 4 Conn. 550; 1 Greenl. Ed. § 265; a grantee who has consented to the destruction of the deed is estopped from giving parol evidence of it for the purpose of claiming title: *Gugins v. Van Gorder* 10 Mich. 523; but where the deed

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is admitted there is no ground for estoppel: *Hayes v. Livingstone* 34 Mich. 391; *Wright v. DeGroff* 14 Mich. 164; *Gimon v. Davis* 36 Ala. 589.

O. J. Fast, *Dallas Boudeman* and *H. H. Riley* for defendants. Where the parties to a deed have voluntarily destroyed it with intent that the title should thereby revest, they are estopped from giving parol evidence of the contents of the deed: 3 Wash. R. P. (4th ed.) § 587 (45a); *Com. v. Dudley* 10 Mass. 402; *Lawrence v. Stratton* 6 Cush. 163; *Holbrook v. Tirrell* 9 Pick. 104; *Trull v. Skinner* 17 Pick. 213; *Blaney v. Hanks* 14 Ia. 400; *Sullivan v. Dunham* 42 Mich. 518; the conveyance in this case was absolute: *Green v. Butler* 26 Cal. 595; *Wynkoop v. Cowing* 21 Ill. 583; *Hinkley v. Wheelwright* 29 Md. 341; *Gwinn v. Smith* 55 Ga. 145; *Harrison v. Trustees* 12 Mass. 456; *Marshall v. Stewart* 17 Ohio 356; *Vennum v. Babcock* 13 Ia. 194; *Falis v. Conway Ins. Co.* 7 Allen 49; *Rice v. Rice* 4 Pick. 350; omission to record a deed made by a husband to his wife in payment of a debt does not in law show a fraudulent intent as against creditors: *Lyman v. Cessford* 15 Ia. 229; *Mixell v. Mixell* 34 Ill. 382; *Page v. Kendrick* 10 Mich. 300; *Keeler v. Ullrich* 32 Mich. 88; *Gale v. Gould* 40 Mich. 515; if made for a valid and adequate consideration at any time before levy on the property of the husband, it ought to be sustained: *Hill v. Bowman* 35 Mich. 191; *Darling v. Hurst* 39 Mich. 765; *Brigham v. Fawcett* 42 Mich. 542; joint occupancy does not show title in the husband alone: Bump Fraud. Conv. 117.

CAMPBELL, J. Complainants filed their bill in aid of an execution levied on certain land in St. Joseph county, the record title of which was in defendant Rebecca, wife of John J. and step-mother of Adalbert N. McAllister. The debt was incurred by John J. and Adalbert N. jointly with Stephen Barnebee in 1878, and judgment rendered the same year. The deed to Mrs. McAllister was dated February 13, 1872, but not recorded until April 15, 1879. The execution was issued in May, 1879.

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The relief is based on a claim that the land, which originally was vested in one Bourn, was bought of him in 1872 and then conveyed to one of the McAllisters, either John or Adalbert, and that, as is alleged, the deed to Rebecca was executed a long time subsequently, by their contrivance, to stand in lieu of the first deed, and without any re-conveyance to Bourn. It is claimed not only that no title actually passed to Mrs. McAllister, but also that the apparent title was put in her, and the deed left unrecorded, without any consideration, and with a purpose of defrauding existing and future creditors, and that the debt to complainant was incurred on representations of ownership of the land made to complainant.

If the transactions which actually took place conveyed any title to Mrs. McAllister, we are entirely satisfied there was no fraud in fact or in law in the conveyance. There is no reason to believe from the testimony that any debts existed which would have rendered even a purely voluntary conveyance to Mrs. McAllister fraudulent. Her husband appears to have been solvent, and free from any indebtedness which he had any occasion to guard against. And there is not the least evidence, in our opinion, which would justify the belief that there was any fraudulent design whatever. The transactions all took place about six years, or nearly that, before the present indebtedness arose, and whatever equities exist in the matter are too old to be in any way affected by transactions in 1878 or thereafter, to which Mrs. McAllister was no party. There is some evidence concerning recent dealings with other lands, which are not involved in this litigation, and which cannot affect this case. We think her rights must be determined by the original nature of the transactions.

The transfer of the land, as clearly shown from the proofs, was first made to John J. McAllister. He had previously received from his wife various moneys derived from the sale of her property, on which he had agreed to pay her interest until otherwise invested. At the time of the purchase from Bourn this debt exceeded the purchase money.

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Before his deed was put on record she desired her husband to secure her on this land, and under the advice of counsel it was understood by all parties that it could be legally done by giving up the first deed, and having a conveyance made directly to Mrs. McAllister from Bourn. This course was taken, and the delay in the recording of this last deed is accounted for, and we think truly, by the forgetfulness of the husband, who had no errand to the county seat for a long time thereafter. The court below was satisfied thus far, and held the arrangement to be a valid mortgage but no more.

It appears further, that a few months after the deed was so taken, Mrs. McAllister made an arrangement to purchase the land absolutely, at an advance of five hundred dollars, and that she surrendered to her husband evidences of debt to the full amount and more, leaving a small balance still her due. If this was so, we think there was no difficulty in upholding it as a sale. She had the title in fee without any written defeasance, and no rule is better settled than the right to extinguish by parol an interest that rests in parol. The cancelling of the debt was a complete payment of consideration, and no further ceremony was needed to make the contract a completely executed one, if she already held the title.

The state of the record might have misled creditors of Bourn, but it could not have deceived any one else. We do not think the facts justify any inference of conduct on the part of Mrs. McAllister, of which her husband's creditors can complain. There was no misrepresentation, and in fact it appears that the farm was quite generally supposed to be hers, by those who had any interest in knowing. But there was nothing in the management which could have much importance in such case, unless her title came by direct conveyance from her husband instead of from Bourn.

The question, then, arises, whether Bourn's deed to her conveyed any title, in view of the former deed to her husband. There can be no doubt that under our recording

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laws she holds what the law presumes unexplained to be the best legal title. There can be as little doubt that in the absence of fraud on her part, complainants got by their levy no better title than McAllister possessed.

As between the parties, it is we think settled law that one who has deliberately and without any fraud or deceit practiced on him, but on the contrary with the intent for good reasons to have the legal title placed in some one else, obtained a transfer which has all the apparent qualities of such a title, cannot assail it by parol evidence, and show the existence of a former deed to himself which he has suppressed without recording, for the very purpose of having the land reconveyed by his own grantor. The case comes within the rule laid down in *Gugins v. Van Gorder* 10 Mich. 523. It seems to be supposed that that case merely decided a technical point of evidence, and is not consistent with *Hayes v. Livingston* 34 Mich. 384, and some other decisions which hold that title to land cannot pass by mere estoppel shown by parol. In this case it is complainants and not defendants that rely on parol evidence to show a title. Mrs. McAllister holds the legal title of record. The presumptions in her favor cannot be destroyed without proof of an earlier right which is based on superior equities, because the first deed recorded is presumptively the best. There would be no equity whatever in allowing a party who has been the procuring agent in giving her this legal priority to destroy it in his own favor, by showing by parol evidence that he once had an unrecorded deed from the same grantor. Complainants show no equity whatever, and are bound by the estoppel against McAllister.

Both parties appealed in this case. We think Mrs. McAllister's appeal was well taken, and that no relief should have been granted complainants against her. The decree must be reversed and the bill dismissed with costs of both courts in her favor.

The other Justices concurred.

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Orrin K. Hopkins v. Peter J. O'Neil, Jr.

False warranty—Averments of declaration.

A declaration in case for false warranty may be sustained without allegations that defendant "falsely and fraudulently warranted" and "falsely and fraudulently deceived" the plaintiff, if the substantial averments show the false warranty and the fraudulent sale, and deception of the purchaser.

Error to St. Clair. Submitted June 21. Decided June 29.

Trespass on the case for damages from false warranty. The counts of plaintiff's declaration were as follows: For that whereas, the said plaintiff heretofore, to-wit: on the 20th day of May, in the year 1880, at St. Clair, in said county of St. Clair, at the special instance and request of the said defendant, bargained with the said defendant to exchange with the said defendant a certain yacht called the "Phaon," with small boat and furniture complete, of the said defendant, for a certain yacht of the plaintiff, called the "Amy," of great value, to-wit: of the value of five hundred dollars, and for a certain sum of money, to-wit: four hundred dollars to be therefor paid and delivered by the said plaintiff to the said defendant, together with the said yacht "Amy" of the said plaintiff in exchange for the said yacht "Phaon," her small boat and furniture, of the said defendant; and the said defendant by then and there *warranting* the said yacht "Phaon" of the said defendant to be sound and in good condition then and there *falsely and fraudulently sold and exchanged* the said yacht, her small boat and furniture, with said plaintiff for the said yacht of the said plaintiff and for the said sum of money to be paid and delivered by the said plaintiff to the said defendant, together with the said yacht of the said plaintiff, as aforesaid. And the said plaintiff confiding in the said warranty afterwards, to-wit: on the day and year aforesaid, in the county aforesaid, delivered his yacht "Amy" and paid the sum of four

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hundred dollars in money to said defendant in exchange for the said yacht "Phaon," the small boat and furniture of said defendant. Whereas, in truth and in fact at the time of the making of the said *false warranty* as aforesaid, and of the said exchange as aforesaid, the said yacht "Phaon" of the said defendant was not sound and was not in good condition, but on the contrary thereof, then was and still is unsound and rotten, and hath become and is of no use or value to the said plaintiff, and also by means of the premises the said plaintiff hath lost and been deprived of the use of his said yacht, and hath also been defrauded of the said sum of money. Wherefore, the said plaintiff saith that he is injured and hath sustained damage to the amount of $1000, and therefore brings his suit. The court below held that the declaration was insufficient. Defendant urged that it should have alleged: (1) "That defendant falsely and fraudulently warranted," etc.; (2) "That by means of the premises the defendant falsely and fraudulently deceived the plaintiff;" (3) "That it should have wound up by alleging, 'and so the said plaintiff saith that the said defendant falsely and fraudulently deceived him, the said plaintiff,'" etc. Plaintiff brings error. Reversed.

Edward T. Solis and *H. W. Stevens* for plaintiff in error.

O'Brien J. Atkinson for defendant in error.

MARSTON, C. J. We are of opinion that the declaration in this case was sufficient in substance. The part omitted, and which was contained in *Carter v. Glass* 44 Mich. 154, adds nothing to the substantial averments. This whole matter has so recently been fully discussed in this court and the distinctions pointed out, that any extended remarks in the present case are wholly unnecessary. *Carter v. Glass* 44 Mich. 154; *Briggs v. Milburn* 40 Mich. 512; *Norton v. Colgrove* 41 Mich. 544.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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ISAAC P. PROSSER ET AL. v. CLARK J. WHITNEY ET AL.

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Appeal bonds cover costs—Cross-appeals.

Appeal bonds are not limited to securing such costs only as result from the appeal; they cover also costs made before the decree.

A prevailing party in a chancery cause cannot object, in the appellate court, to the denial of costs below if he has let the case go up on his adversary's appeal alone without appealing himself from so much of the decree as he objected to.

Where the parties to a chancery cause make cross-appeals upon which one succeeds and recovers costs as against the other, the latter's appeal bond may be made to secure their recovery even though his own appeal was merely from a denial of costs below, and the appellate court passed upon his adversary's appeal alone, without reference to his, and awards costs of both courts against him.

Where both cross-appellants fail, costs may be apportioned between them in the discretion of the court and on a consideration of the equities.

Error to Kalamazoo. Submitted June 21. Decided June 29.

ASSUMPSIT. Defendant brings error. Affirmed.

Brown, Howard & Roos for plaintiff in error, cited *Bell v. Bruen* 1 How. 184, and *Wheaton v. Thompson* 20 Minn. 196.

O. W. Powers for defendants in error.

COOLEY, J. The suit in the court below was by Whitney and Wheat against Prosser and the other plaintiffs in error to recover upon a bond given on taking an appeal in chancery. In the chancery cause Whitney and Wheat were complainants and Prosser was one of several defendants. The decree denied to the complainants the relief they prayed, but it also denied costs of his defence to Prosser. Complainants appealed and so did Prosser; and under the statute the parties appealing were required to give bond to

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abide the order of the appellate court. Prosser's bond was in the penal sum of one hundred and fifty dollars, and the condition was as follows: "The condition of the above obligation is such, that whereas, on or about the 19th day of February, A. D. 1879, a decree was entered in the circuit court for the county of Kalamazoo, in chancery, in a certain cause therein pending, wherein the said Clark J. Whitney and Isaac C. V. Wheat are complainants, and the said Isaac P. Prosser, among others, are defendants; and whereas, the said complainants have appealed from said decree to the Supreme Court of the State of Michigan; and inasmuch as in and by said decree the said Isaac P. Prosser is denied costs of suit in the circuit court, and he having appealed from that portion of said decree denying him costs. Now, therefore, if the said Isaac P. Prosser shall pay, satisfy and perform the decree or final order of said Supreme Court, and shall pay all costs in case the decree of the said circuit court, in chancery, shall be affirmed in parts appealed from by said Isaac P. Prosser, then this obligation to be void, otherwise to remain in full force and effect."

The appellate court by its decree awarded to the complainant the relief prayed for, with costs of both courts as against Prosser. The costs were taxed at upwards of three hundred dollars. An execution issued upon the decree having been returned *nulla bona*, this suit was then instituted upon Prosser's appeal bond. The circuit court gave judgment in favor of the plaintiffs below for the amount of the penalty.

The decree of the Supreme Court took no notice of the separate appeals, but awarded costs to complainants in precisely the same form that it would have done had complainants alone appealed. It is therefore insisted on behalf of plaintiffs in error that there has been no decree whatever upon what they designate the cross-appeal; no special adjudication and no award of costs in respect to it. The decree is single and is made upon the merits which are brought up for consideration by the appeal of complainants; and the award of costs is made in disposing of the merits, and without regard to the appeal taken by Prosser. From

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these facts it is insisted that there has been no breach of the bond now in suit; the true intent and meaning of its condition being to secure payment, satisfaction and performance of the decree or final order that should be made on or in respect to the appeal which Prosser had claimed.

If appeal bonds were intended to secure the payment of such costs only as should be made in consequence of the appeal, the argument made for the plaintiffs in error would be very plausible and perhaps conclusive. It might be necessary in that case, before there could be a recovery on any bond where two or more appeals were taken, that the costs should be apportioned by an adjudication of the court, and the proper amount assigned to each appeal. But the appeal bonds are not thus restricted in their scope: the costs made in the case previous to decree in the court of chancery are equally within their condition, and these of course are not referable to the appeal, and cannot be apportioned as between appellants except upon reasons appealing to the discretion and which should have influenced the chancery court.

Nor is there any other reason which is obvious to our minds why the liability of one appellant upon an appeal bond should necessarily be affected by the fact that another party has taken an appeal also. If the case were such that both parties failed in separate appeals, the court would probably apportion the costs between them; but this would be done in its discretion, and on a consideration of equities. But when one appellant succeeds on his appeal, and recovers costs as against the other, there is no reason why the appeal bond of the latter should not secure this recovery.

In the case at bar the complainants appealed. Prosser, had he seen fit, might have left the case to go to a hearing in the Supreme Court on their appeal, but in that case he would have been precluded from making objections to that part of the decree appealed from which denied him costs. *Proctor v. Robinson* 35 Mich. 284. He preferred to appeal from that part; and the statutory condition was that he should give such a bond as he gave. In giving that bond

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he and his sureties undertook to "pay, satisfy and perform the decree or final order" of the Supreme Court, and to "pay all costs in case the decree of said circuit court in chancery shall be affirmed in parts appealed from" by him. The appellate court not only sustained and in legal effect affirmed the decree in that part which denied him costs, but it also awarded costs of both courts against him. Plainly, as we think, the case is within the condition of the bond, and the court was right in ordering judgment for the plaintiffs.

The judgment must be affirmed with costs.

The other Justices concurred.

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HERVEY SULLINGS v. ANDREW J. SHAKESPEARE.

Jurors—Challenge—Qualifications—Newspaper libels—Justification—Headlines—Repetition—Printer's errors—Physicians.

Overruling a challenge for cause and compelling the party to resort to a peremptory challenge does not prejudice him where he still has a right of peremptory challenge which he does not use.

Where a juror challenged for opinion shows by his answers that he has no definite *recollections* there is no apparent ground for holding him disqualified.

In a criminal prosecution for libel the truth alone, if not published with good motives and for justifiable ends, is not always a complete defence.

In a civil action for libel no damages are recoverable for a libel that contains no falsehoods.

Where a declaration for a libel published in a daily newspaper, does not aver its publication in the weekly edition, an offer to prove the circulation of the weekly is properly rejected until proof is made that it was published in that edition.

In an action for newspaper libel an offer was made to show that the declaration was afterward published with head notes referring to plaintiff's attorney but not to the plaintiff. *Held* proper to exclude proof of the head notes.

Repetition of a newspaper libel may be shown by proving the publication of the declaration containing the libelous articles in full.

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In a civil action for newspaper libel, the defendant, who was publisher of the paper, was properly allowed to state, on cross-examination, that the article complained of was not written by him.

A civil action for newspaper libel was based on the publication of an article shown by defendant to have been handed to him for publication by plaintiff himself, but which was illegibly written, and was not published as written; there was no showing that it had been intentionally altered nor any plain proof of negligence; and it was also shown by defendant that plaintiff had said he would be satisfied if it could be corrected and put in the weekly edition. Plaintiff did not deny this and was not examined as to the article, and there was no testimony indicating what words were changed. *Held* that the article could not go to the jury as a basis of damages.

A printer's mistakes made without wrongful intent in printing a self-laudatory article furnished for publication by the subject of it, cannot be held a malicious libel.

A physician has no right to publish matters of professional confidence without the approbation of the person concerned; it is a breach of professional duty deserving censure.

In a civil action for libel based on a newspaper squib making game of the plaintiff, it is competent for the defendant to show how far the facts alleged or any part of them were true, and how far their truth would leave any cause of action remaining. It is also admissible to show under what circumstances the article was prepared and published.

Where an action of libel is based on a newspaper squib, and there is evidence tending to show that it arose out of a mutual banter, and that defendant told plaintiff he was going to publish it and that plaintiff assented, it is for the jury to find under proper instructions whether the article is really libelous even though it would be if unexplained.

Where a physician complaining of a libel claims that it injures his medical character, evidence as to his medical standing becomes relevant.

Error to Kalamazoo. Submitted June 21. Decided June 29.

TRESPASS on the case. Plaintiff brings error. Affirmed.

Oscar Tuthill for plaintiff in error. Jurors should be unbiased by previous opinions or by their knowledge of the case or by reported facts: *Exp. Vermilyea* 6 Cow. 562: 7 Cow. 121; *Holt v. People* 13 Mich. 224; *Lee v. State* 45 Miss. 114; *Myers v. Commonwealth* 79 Penn. St. 308; one

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should not be forced to resort to a peremptory challenge by overruling a challenge for cause: *People v. Weil* 40 Cal. 268; the publisher of a libel cannot defend by showing that he published it in good feeling: Stark. Slander 393, n; Townshend Slander 125, n; *Whittemore v. Weiss* 33 Mich. 349; a publication that tends to bring reproach, scorn and contempt upon a person is libelous: *More v. Bennett* 48 N. Y. 472; *Cary v. Allen* 39 Wis. 482; *Cropp v. Tilney* 3 Salk. 226; Cooley on Torts 207; *Gottbehut v. Hubachek* 36 Wis. 515; *Filber v. Dautermann* 28 Wis. 134; *Scripps v. Reilly* 38 Mich. 10; *Lewis v. Clement* 3 B. & A. 702; *Saunders v. Baxter* 6 Heisk. 369; *State v. Jeandell* 5 Harr. (Del.) 475; *Roberts v. Brown* 10 Bing. 519; *Hillhouse v. Dunning* 6 Conn. 391; repetition of libelous articles is an aggravation of the libel: *Leonard v. Pope* 27 Mich. 145.

O. W. Powers for defendant in error.

CAMPBELL, J. Sullings sued Shakespeare, who was publisher of the Kalamazoo *Gazette*, for publishing two alleged libels. One was claimed to be libelous because describing plaintiff as having performed a surgical operation by removing a "patty tuber" from the "hypogastrium" of one A. B. Smith. The other contained an account of a ride taken by plaintiff in Kalamazoo written in a style tending to throw ridicule on plaintiff as displaying ostentation, and as not used to such indulgences.

The jury found a verdict for defendant. The case went throughout, and the charge also was based, on the theory that the articles unless in some way explained or accounted for were actionable. The chief objections to the rulings rest on the claim that as the case stood before the court they were too favorable to the defence. Before referring to the state of the issues and evidence a preliminary question arose concerning the jury.

The record shows that one juror who had an opinion that it would require evidence to remove was challenged, and the challenge was overruled, and then he was challenged peremptorily. But it appears further that when the trial was

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opened plaintiff had still one peremptory challenge that he did not use. If by the overruling of the challenge anything could be inferred in the cause prejudicial to the rights of the plaintiff by compelling him to exhaust his peremptory challenges on persons liable to other objections, the case would be different. But when he runs no such risk the error does not appear to have been injurious. A second juror challenged for opinion seems by his answers to have had no definite recollections at all, and we are not satisfied there was any error in holding him not disqualified. His answers were vague, and the court below evidently determined on his testimony that he had not formed such an opinion as would be material.

A considerable number of objections assume that if an article is maliciously libelous, its truth alone will not be a defence. In this there is a confusion of civil and criminal remedies. In a criminal prosecution the truth alone, if not published with good motives and for justifiable ends, is not always a complete defence. But in civil cases it is well settled that no damages can be given for a libel that contains no falsehood. This disposes of the objections to a large amount of testimony concerning the circumstances of the second libel, which will be referred to more fully in its place.

At the beginning of the hearing, and before any proof of publication of the articles, an attempt was made to prove the circulation of the weekly edition of the *Gazette*, but the court refused to admit it at that time. The declaration did not aver publication in the weekly, and the offer was at least premature, and properly rejected.

After the articles were proven, an offer was made to prove the subsequent publication of the declaration, with head-notes referring solely to the attorney of plaintiff but not to the plaintiff. The court excluded the head-notes. As they had no reference to plaintiff we do not think the exclusion erroneous. The declaration, setting out the obnoxious articles in full, was admitted to show repetition of the libels. This ruling was not injurious to plaintiff.

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In the further discussion of this case, the two articles will require separate reference.

The court allowed defendant on cross-examination to explain that the article describing the surgical operation was not written by him. We can see no good reason for excluding this answer. Subsequently defendant testified fully on the subject and showed that the plaintiff wrote it himself and handed it to defendant with a desire that he should publish it, and it was accordingly handed over to the printers as it stood. There was evidence that it was very illegibly written, and there was no evidence of any intentional alteration, and none, unless possibly by very remote inference, that there was any negligence. It was also testified by defendant that plaintiff complained to him of the error, but said if it could be corrected and put in the weekly he would be satisfied, and this was done. Plaintiff when put on the stand did not deny this, and was not examined at all concerning that article. There was no testimony whatever indicating what words had been altered in the article.

We think that this article could not under these circumstances go to the jury as a basis of damages. It does not occur to us that any necessary or natural inference would arise that the offensive words—which however are not shown to have been so written as to put any one in fault—were any more than a printer's blunder. We do not think a libelous meaning is apparent, although circumstances might put a different shade upon them.

But the article being written by plaintiff as a gratuitous puff of himself, and published at his request, we do not see how a mistake of the printers without wrongful intent could be held a malicious libel. This is not a suit on the case for damage from negligence, and the law of libel does not we think reach such a blunder, if any was made.

We cannot forbear, in the interest of public morality, to call attention to the fact that the plaintiff, if a physician, has no right to publish matters of professional confidence, and that the article if published as he wrote it, without the approbation of the person operated on, would have been a

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very plain breach of professional duty. Such publications, for no purpose of public instruction and only for private gratification or laudation, deserve severe censure.

The matters included in the second article, which is undoubtedly written in a manner open to criticism, involve, *first*, matters of fact, and *second*, matters of comment. There was evidence to go to the jury on all the facts set forth in it, which were, when reduced to their plain meaning, substantially these, viz.: That on the day previous the plaintiff, who was described with some superfluous initials and appendages, rode about town in an ostentatious style as the sole occupant of an elegant chariot. That he was expecting large profits from a suit with the Vulcanite Rubber Company. The comments, which were interspersed, intimated that the excursion was by way of practice and in anticipation of a more exalted station when more style would be necessary. The article also satirically denies the truth of some further parade, and intimates that it was the first ride he had ever taken.

However offensive the whole article might have been, it was unquestionably competent for the defendant to show that the facts alleged were true or that any part of them were true, and also how far their truth would leave any remaining cause of action. It was also proper to show under what circumstances the article was prepared and published.

Upon this the testimony was not contradictory as to the fact that on a mutual banter, the local editor of the *Gazette* agreed to pay and did pay the driver of the vehicle, if the plaintiff would ride in it. It is uncontradicted that he told plaintiff he proposed to write an article on the subject, but there is a conflict as to plaintiff's assent, and also as to the circumstances of the announcement. There was also evidence bearing on the Vulcanite litigation. Under these circumstances it is evident that plaintiff upon his own statement laid himself open to sharp comment, and upon defendant's proofs there was evidence going far enough, if believed, to make out an assent to the publication.

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When the record was in such a condition, it certainly was for the jury to determine, under proper instructions, whether the article was really libelous, if we assume that it would have been so if unexplained. And we cannot regard any of the surroundings as irrelevant.

Neither was the testimony as to his medical standing irrelevant. He made the injury to his medical character a ground of complaint. Moreover it may be remarked that the physicians who were put on the stand testified nothing to his discredit, and it is doubtful how far their testimony could be regarded as of any importance whatever.

The charge given to the jury was, we think, very fair and very explicit in granting all of the essential requests of the plaintiff except such as would have violated the rules before laid down. Nothing was excluded from consideration, and they were given full discretion on the subject of damages. It would have been misleading to give speculative charges on any theory that would have ignored the evidence; and it would have been erroneous to allow recovery for articles or parts of articles which were true. Beyond this we can discover no failure to present the plaintiff's case in as strong a light as it could be placed.

The judgment must be affirmed with costs.

The other Justices concurred.

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THOMAS R. YOUNG v. ROLLIN E. KELSEY.

Certiorari—Issue of writ—Conclusiveness of return.

The return to a writ of *certiorari* must be assumed to be correct.

Certiorari is not a writ of right, and can only issue on satisfying the circuit court commissioner or circuit judge that an error has been committed. Comp. L. § 5466.

Where the return to a writ of *certiorari* shows that it was never allowed, a judgment dismissing it will be affirmed without considering whether the plaintiff therein would have been entitled to amend it, or whether he could bring error on the refusal to allow an amendment of it.

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Error to Shiawassee. Submitted June 21. Decided June 29.

Assumpsit. Defendant brings error. Affirmed.

James M. Goodell for plaintiff in error.

McBride & Fraser for defendant in error.

Campbell, J. *Certiorari* having been brought in the circuit court for the county of Shiawassee upon a judgment rendered by the recorder of Corunna, acting as a justice of the peace, the circuit court dismissed it as returnable on Sunday. Plaintiff in *certiorari* brings error.

The writ was clearly irregular, but it is claimed the court should have allowed an amendment. It appears, however, from the return, which we must assume to be correct, that the *certiorari* was never allowed by any one. The writ is never a matter of right, and can only issue upon satisfying the circuit court commissioner, or circuit judge, that there has been an error committed. Comp. L. § 5466. And the court in deciding finally on *certiorari* in such cases is bound to disregard all defects not affecting the merits. § 5477.

This being the case the party could have gained nothing by an amendment if allowed; and we need not consider whether or not such an amendment could be regarded as one which the court could in a *certiorari* case be bound to grant, or whether if so, this is a proper method of objecting to the refusal.

The judgment must be affirmed with costs.

The other Justices concurred.

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THE KENT FURNITURE MANUFACTURING COMPANY v. LOOMIS E. RANSOM.

Action for services—Proof of value—Quantum meruit.

The admission of the opinion of a witness living in one place as to the value of services performed at another is not error where there is nothing to show that he did not know the value of labor at the latter place or the comparative value of wages at both.

The fact that a witness' answer goes beyond the question, is not a ground of error where it was not objected to for that reason and there was no motion made to strike out any part of it.

Where a company contracts to pay an employee "the same wages as shall be paid to other men in the employ of the company filling similar positions," and the laborer sues for compensation and there is no showing that the company had other employees in similar positions, the plaintiff is entitled to prove what his services were worth

The Supreme Court cannot consider the weight of testimony.

Error to Kent. Submitted June 21. Decided June 29.

ASSUMPSIT. Defendant brings error. Affirmed.

Taggart & Wolcott for plaintiff in error.

J. W. & O. C. Ransom for defendant in error.

MARSTON, C. J. Ransom brought *assumpsit* to recover a balance claimed for personal labor performed under a written agreement with the plaintiff in error. The cause was tried by the court, without a jury, and a judgment rendered in favor of the plaintiff. The case comes here on writ of error.

The first and second errors assigned relate to the testimony of the witnesses, Jacobs and Knight, in answer to interrogatories. The services which the plaintiff was to perform were to be rendered at Grand Rapids, in this State, while the witnesses interrogated resided at Sandusky, Ohio, and the question asked was what in their opinion the serv-

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ices of the plaintiff would be worth as an assistant in the manufacture and sale of a certain bed-spring.

The specific objection pointed out on the trial was that the witnesses did not profess to know anything of the comparative value of wages at Sandusky and at Grand Rapids, nor the value of services or labor at Grand Rapids. It is a sufficient answer to say that there is nothing in the case tending to show that they did not, and at the present time, in view of the facilities for obtaining accurate information, and of traveling from place to place, we cannot assume that these men did not possess the necessary information to enable them to testify, or that there was any difference in the prices paid for, or the value of, skilled labor between the places mentioned. The form of the question was not any broader than the contract, as under it the plaintiff was employed to assist in the manufacture and sale of the patented article, and although the answers given may have gone beyond the questions asked yet no objection was made on that ground, or motion made to strike out any part thereof.

It is also claimed that this evidence was not competent, as under the written agreement the plaintiff was to be paid "the same wages as shall be paid to other men in the employ of the company, filling similar positions." The evidence is all set forth in the bill of exceptions and we do not find anything therein tending to show that the company had any other men filling similar positions, and in the absence thereof, the plaintiff was entitled to prove what his services were worth.

It is next claimed that the judgment is not supported by any evidence in the case. We are of a different opinion. There certainly was evidence tending to support the judgment, and the weight thereof we cannot consider.

The judgment must be affirmed with costs.

The other Justices concurred.

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HIRAM WYMAN AND ELLIOTT G. STEVENSON v. CHAS. BAER.

Affidavit of publication—Tax-titles—Estoppel—Assessments.

In ejectment by a purchaser on foreclosure the original affidavit of publication showed that the notice of sale was insufficient, but another affidavit was produced, correcting the first, and the publisher gave evidence tending to show that the sale was regularly advertised, and that the original affidavit was incorrect. *Held* that the testimony was admissible, but that it was for the jury to pass on, and could not be treated as conclusive by the court.

A mortgager in possession under color of title is presumed in the absence of evidence to the contrary, to be owner of the inheritance, and a purchaser on valid foreclosure acquires the same interest which he holds.

One who indemnifies a mortgagee against a tax-title cannot afterward set up the tax-title against his title as purchaser on foreclosure.

A tax-title is invalid where the land has been assessed in one body at one sum, while a particular share of the whole tax has been arbitrarily apportioned to a specific parcel.

Error to St. Clair. Submitted June 22. Decided June 29.

EJECTMENT. Defendant brings error. Reversed.

O'Brien J. Atkinson for plaintiff in error.

Avery Brothers for defendant in error. A person who gives a bond to indemnify a mortgagee against a tax-title cannot equitably buy the title and hold it as against him: *Doe v. Clifton* 4 Ad. & El. 813; *Lane v. Reynard* 2 S. & R. 65; *Gardiner v. Gerrish* 23 Me. 50; *Blake v. Howe* 1 Aik. 306; whatever he acquires must go to the benefit of the mortgagee's title and not to the injury of it: *Horton v. Ingersoll* 13 Mich. 409; *Bank v. Bronson* 14 Mich. 373; *Page v Webster* 8 Mich. 263; *Butler v. Porter* 13 Mich. 292; *Cooley v. Waterman* 16 Mich. 366; *Dubois v. Campau* 24 Mich. 360; *Sands v. Davis* 40 Mich. 14.

GRAVES, J. Baer brought ejectment for certain premises situated in St. Clair county and known and designated as lots

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seven and eight and the east twenty feet of lot six in block thirty-three of the village of Fort Gratiot. The action was tried before a jury and at the close of the evidence the circuit judge directed a verdict in favor of the plaintiff. The general question is whether the circuit judge was warranted in refusing to take the sense of the jury on the facts.

The plaintiff claimed title by purchase on sale made by the sheriff on the foreclosure of a mortgage made by William D. Wright to the plaintiff in 1873, and one of the main subjects of controversy at the trial was whether this foreclosure was valid or not. The sale was made in 1877, and the affidavit then made by the publisher of the newspaper to perpetuate regular proof of publication of the notice of sale imported that the notice had not been sufficient. Two years later the same person made another affidavit which assumed to correct the first and show that in fact the notice was duly published, and both affidavits were introduced as evidence before the jury. He also testified as a witness on the subject and gave evidence tending to show that the sale was regularly advertised and that the original affidavit was inaccurate through mistake.

It will be seen from this that the evidence to show a valid notice was conflicting and the defendants made it the subject of a specific request. The admission of the evidence to prove that in point of fact there was lawful notice was entirely proper. But it was not competent for the judge to treat it as conclusive and withhold it from the consideration of the jury.

When Wright gave the mortgage he was in possession under color of title and in the absence of anything to the contrary the presumption is that he was owner of the inheritance, and in case the foreclosure was lawful the plaintiff by his purchase thereon acquired the same interest unless the tax titles were in the way There is no dispute that at the time Baer negotiated with Wright about loaning the money and taking the mortgage, the Harrington tax-titles were regarded by Baer as obstacles, and that Wright as principal and Mr. Atkinson as his surety gave him their

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bond to indemnify him against those titles. Having taken upon him this obligation to protect Baer against them, Mr. Atkinson could not be allowed to set them up against Baer's mortgage title, and there is nothing in the case to show that Stevenson who claims under Atkinson is in any better position.

The tax title held by Mr. Atkinson is for the taxes of 1874, and there is considerable evidence tending to show that the proceedings were invalid. But there is also evidence which is positive. The assessment roll was produced and it appeared therefrom that lots five, six, seven and eight of block thirty-three, which included the premises in controversy were assessed together at $850, the tax being $42.06; and that the portion of the tax estimated as the share of lot five and the west five feet of lot six was received by the collector, and that the residue of lot six and lots seven and eight were returned. The tax-title of Atkinson having originated in these proceedings it is not valid. There was no authority to cut up into parcels the premises assessed in one body and at one sum and arbitrarily apportion to a specific part a particular share of the whole tax.

The judgment is reversed with costs and new trial granted.

The other Justices concurred.

Betsey Gordon v. Benjamin F. Farrington.

Replevin by trustee in bankruptcy—Oral evidence.

A trustee in bankruptcy can maintain replevin for property belonging to the bankrupt but held by one who claims under a contract purchaser who has not fulfilled the terms of the contract.

Oral evidence is admissible, if no objection is made, to show that plaintiff in replevin is trustee in bankruptcy of the owner of the property, and that his previous right as assignee of the owner is not cut off by the decree in bankruptcy so far as relates to the right to maintain the action.

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Error to St. Clair. Submitted June 22. Decided June 29.

REPLEVIN. Defendant brings error. Affirmed.

O'Brien J. Atkinson and *Elliott G. Stevenson* for plaintiff in error. Adjudication of bankruptcy divests the bankrupt of all right to his property: *Exp. Foster* 2 Story 131; *Matter of Cook* id. 376; *Smith v. Eaton* 36 Me. 298; *Plestoro v. Abraham* 1 Paige 237; *Howard v. Crompton* 14 Blatch. 328.

C. K. Dodge and *A. E. Chadwick* for defendant in error.

GRAVES, J. This controversy concerns the right to an organ. The defendant in error took the instrument on replevin and recovered. Prior to October 19, 1876, one Roe Stephens owned the organ and left it with Charles F. Colwell at London, Ontario, to be disposed of, and he, at the date mentioned, leased it to one Abel Scott, who was to be allowed to purchase on certain terms. The title was not to pass without payment of the purchase price. Scott has never paid anything, and prior to this suit the property and right of possession were in Stephens.

Scott removed the property to Port Huron and the plaintiff in error derived her claim through him. Stephens assigned his right to Farrington, who thereby became entitled to have the organ unless Stephens' right was cut off by his bankruptcy, so that nothing passed from him to Farrington, and it is claimed by plaintiff in error that the evidence shows that this was the case, and in support of this view reliance is placed on the order found in the record by which Stephens was adjudged a bankrupt on the sixth of October, 1877. But there is nothing in this order to militate against the right claimed by Farrington, since he may have been the trustee in bankruptcy and have become entitled in that character. And all question on the subject is removed because it appears by the oral evidence, which was not objected to, that Farrington was in fact such trustee and hence vested with the right which Stephens held.

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The objections now insisted on to certain parts of the depositions of Colwell, Raymond and Dyer have no force and do not require comment.

This disposes of the case and requires an affirmance of the judgment with costs.

The other Justices concurred.

Frederick Coats v. Benjamin F. Farrington.

Decree in bankruptcy superseding common-law assignment.

A trustee in bankruptcy can maintain replevin for property of the bankrupt sold on an execution against him after the decree of bankruptcy.

Error to St. Clair. Submitted June 22. Decided June 29.

Replevin by Farrington, who was trustee in bankruptcy for Roe Stephens, against Coats, who had purchased a Standard organ at a sale on execution against the said Stephens. The organ had been sold by Stephens in 1876 to Anna M. Keery, but by the terms of the sale she was not to acquire title until it had been fully paid for. On default in payment it was taken from her in 1878 by Farrington's attorney and was left at D. M. Church's, where it was afterwards seized on execution for costs against Stephens in a suit began by him in his own name, and was sold to the defendant Coats. Stephens had made a common-law assignment to one Swartz, which was dated April 10, 1877, but he was adjudicated bankrupt October 6, 1877, by a decree of the district court, and Farrington was appointed his trustee on the following fourteenth of November. The court set aside the assignment and directed that all of the property of Stephens, including that covered by the assignment, should be transferred to Farrington and that the trustee should be invested with title thereto. The court directed a verdict for Farrington. Defendant brings error. Affirmed.

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Elliott G. Stevenson and *O'Brien J. Atkinson* for plaintiff in error.

Charles K. Dodge for defendant in error. An order of the bankruptcy court setting aside a common-law assignment and putting a trustee in charge of the bankrupt's property establishes the trustee's title thereto: U. S. Rev. Stat. §§ 5103–4; if the bankrupt court obtained jurisdiction subsequent proceedings are presumed regular: Bump's Bankruptcy (9th ed.) 682; *Smith v. Engle* 9 Chic. Leg. News 46; a purchaser on execution gets no title unless the property bought belonged to the judgment debtor: Benj. Sales § 17; *Champney v. Smith* 15 Gray 512; *Johnson v. Babcock* 8 Allen 583; *Symonds v. Hall* 37 Me. 354; *Coombs v. Gorden* 59 Me. 111; *Boggs v. Fowler* 16 Cal. 560; replevin lies against the vendee: *Huber v. Sharck* 2 Browne (Pa.) 160: 6 id. 2; *Ward v. Taylor* 1 Penn. St. 238.

Marston, C. J. It clearly appears in this case that under and by virtue of the bankruptcy proceedings all the property, of which the organ in controversy was a part, of Roe Stephens passed to and became vested in Farrington, who was then entitled to the possession of the same. There was no evidence given on the trial below tending to show that Farrington had parted with the title he thus acquired in this organ, or that he had done or permitted anything to be done which would revest title thereto in Stephens, or that would tend to show that Stephens had any title thereto or interest therein subject to levy and sale under an execution at the time of the levy and sale by the sheriff.

The court committed no error and the judgment must be affirmed with costs.

The other Justices concurred.

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DANIEL WOODIN, ADMINISTRATOR OF THE ESTATE OF ALBERT STALEY v. SARAH M. DURFEE.

Appeal bond—Fraudulent execution—Sureties—Setting aside verdict.

Where an appeal bond names certain persons as sureties, it must be assumed that each one contemplates that the rest will join in its execution; and one who sues on the bond has the burden of explaining the omission of any one to do so. And if any surety denies its execution on oath and testifies that his supposed signature is a forgery, and the justification of the sureties a fraud, the plaintiff is under stronger obligation to show that defendant signed and delivered the bond with full knowledge of the facts.

In an action on a bond evidence tending to show that its execution is fraudulent is for the jury, especially if the fact is not conceded or beyond dispute.

A trial judge cannot deprive the jury of its right of judgment even though the evidence submitted is positive and in part uncontradicted. But if the jury returns a perverse verdict he may set it aside, and order a new trial.

Error to St. Clair. Submitted June 22. Decided June 29.

APPEAL from the allowance of a claim by commissioners on the estate. The administrator brings error. Reversed.

W. F. Atkinson & Vance for plaintiff in error. Where a claim against an estate is founded upon decedent's bond, it is improper to put the bond in evidence until proof is made of decedent's signature: *Comstock v. Smith* 26 Mich. 315.

Crocker & Hutchins for defendant in error. If a surety on a bond treats it as completed when he signs it and puts it in the way to give it efficacy he is estopped from denying its execution and validity and his liability upon it: *McCormick v. Bay City* 23 Mich. 457; *State v. Peck* 53 Me. 284; *State v. Pepper* 31 Ind. 76; *Millett v. Parker* 2 Met. (Ky.) 608; *Dair v. United States* 16 Wal. 1; *Brown v. Probate Judge* 42 Mich. 501; it is for the jury to determine whether

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the evidence fairly tends to establish facts essential to admitting the bond in evidence: *Ortmann v. Merchants' Bank* 41 Mich. 482.

COOLEY, J. In the circuit court the judge directed the jury to return a verdict for the plaintiff; and the writ of error raises the question whether he could rightfully do this on the case as it stood.

The respondent in the circuit court was the estate of Albert Staley. The claimant was Sarah M. Durfee, as administratrix on the estate of James F. Durfee, deceased. The claim was made upon a bond, which, with the justification of sureties and approval of the probate judge, is given in the margin.* No question is made that the jurisdictional

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**State of Michigan, County of Macomb,—ss.:*

In probate court for said county.

IN THE MATTER OF THE ESTATE OF JAMES S. DURFEE, DECEASED.

Know all men by these presents, that we, Gardner M. Durfee, as principal, and Albert Staley, and Solomon Kittridge, and Hiram Savage, as sureties, are held and firmly bound unto Sarah Durfee, administratrix of the estate of James S. Durfee, late of said county, deceased, in the sum of four hundred dollars, lawful money of the United States of America, to be paid to the said Sarah Durfee, administratrix of the estate of said James S. Durfee, deceased, or to her certain attorney, heirs, executors or assigns, well and truly to be made, we bind ourselves, our heirs, executors and administrators, each and every of them, firmly by these presents.

Sealed with our seals, and dated the 27th day of Oct., A. D. 1877.

The condition of this obligation is such, that whereas, the said Gardner M. Durfee has made and filed his appeal to the circuit court for the county of Macomb, and State of Michigan, from the order and decree made by the judge of probate, for said county, on the 29th day of November, 1876, and recorded in the probate office of said county, on the same day, admitting to probate one certain instrument, dated the 5th day of September, 1868, one codicil dated the 5th day of September, 1868, and one codicil dated the 16th day of September, 1874, and purporting to have been executed by said deceased, in his life-time, and for the last will and testament of said deceased, and from the decree and order of the judge of probate for said county, made the 8th day of January, 1877, admitting said will, and granting letters of administration of the estate of said deceased, with a copy of said will annexed, to Sarah Durfee, widow of said deceased, as appears by the orders and decrees, of record in said court.

Now, then, if the said Gardner M. Durfee, appellant, shall diligently prosecute said appeal, and shall pay all damages and costs that shall be

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facts essential to the giving of a valid bond existed, but it was denied that the bond in controversy was ever so executed as to make it a binding obligation of Staley.

It will be observed that Solomon Kittridge is named in the bond as one of the sureties, but he does not sign it. It must be assumed that the other sureties when they signed contemplated that he would join in the execution; and the absence of his name makes it incumbent upon the claimant to give some explanation before she can be in position to demand judgment against Staley and Savage. *Johnston v. Kimball* 39 Mich. 187; *Hall v. Parker* id. 287. But Savage denied under oath the execution of the bond by himself, and gave strong evidence tending to show that his alleged signature was a forgery and the pretended justification a fraud. This showing added to the necessity that the claimant should give such evidence as should affirmatively establish the fact that Staley signed and delivered the bond with full knowledge of all the facts.

The claimant undertook to give such evidence, and we take from the brief of her counsel a statement of what is supposed to have been shown.

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awarded against him in case he shall fail to obtain a reversal of said decree and orders so appealed from, the preceding obligation to be void and of no effect; otherwise to remain in full force and virtue.

GARDNER M. DURFEE. [Seal.]
ALBERT STALEY. [Seal.]
HIRAM SAVAGE. [Seal.]

In presence of ABRAM MAXSON.

State of Michigan, County of St. Clair,—ss.:

On this 27th day of October, 1877, before me, a justice of the peace in and for said county, personally came Albert Staley and Hiram Savage, the sureties named in and who executed the foregoing bond, and being by me duly sworn depose and, each one for himself, says that he is the owner, individually, of real and personal estate of the value of four hundred dollars and over, situate in the county of St. Clair, and State aforesaid, over and above all debts and liabilities they are respectively liable for and over and above all exemptions they are entitled to claim under the laws of said State.

MOSES HART,
Justice of the Peace of said county.

County of Macomb,—ss.:

At a session of the probate court for the county of Macomb, holden at the probate office on Tuesday, the 30th day of October, 1877, I have approved of the foregoing bond, and order the same to be filed in the records of this court.

JAMES B. ELDRIDGE,
Judge of Probate.

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The bond was drawn by R. P. Eldridge, who was attorney for Gardner M. Durfee in the probate appeal. Durfee signed it Saturday evening, October 27, 1877. The next day it was taken to Staley's house and signed by him. In the subsequent proceedings Staley appears as the actor. Kittridge was at Staley's house that forenoon, but refused to sign the bond. Staley sent for Savage, and Savage signed it, on being assured by Staley that the bond was bad and that he would protect Savage against all harm. Staley afterwards got Abram Maxon to sign the bond as a witness, and then went without being accompanied by Savage to the house of Hart, the justice, and induced him to sign the certificate of justification. The next day the bond was sent to the county seat and delivered to the judge of probate.

The most of these facts the claimant insists are entirely undisputed on the evidence; and she claims that they establish beyond question the liability of Staley on the bond, and that the judge was at liberty to so instruct the jury. But the difficulty is that the facts were not conceded or beyond dispute: there was evidence of them which probably ought to have satisfied any one to whom it was addressed; but evidence is for the jury, and the trial judge cannot draw conclusions for them. It is said that on some points there was no evidence of a conflicting nature; but that does not aid the claimant. A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment. If they return what he thinks is a perverse verdict, he may set it aside and order a new trial; but he cannot take upon himself their functions as was done here.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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JOHN M. HART v. TOWNSHIP OF PORT HURON.

Justices' courts—Suit by municipality—Certiorari—Official title.

A justice of the peace can hear a suit brought by a municipal corporation.

The objection that the evidence introduced in support of a claim is not the best evidence cannot be raised for the first time in the Supreme Court.

On *certiorari* all objections that are not to the merits must be disregarded. Comp. L. § 5477.

Omission to sue a municipal officer by his official title is not a substantial objection if his liability is shown.

Error to St. Clair. Submitted June 22. Decided June 29.

ASSUMPSIT. Defendant brings error. Affirmed.

Phillips & Vance for plaintiff in error.

Charles K. Dodge for defendant in error. Corporations can sue in all courts: Const. art. xv. § 11; Potter's Law of Corporations, §§ 83-4; and this includes municipal corporations: Comp. L. § 5296; townships are municipal corporations: Const. art. xi. § 2; and may sue in justice's court: *Gurney v. Mayor of St. Clair* 11 Mich. 203; where the return to a writ of *certiorari* raises no law questions the higher court has no right to review the proceedings on the weight of testimony: *McGraw v. Schwab* 23 Mich. 13; *Overpack v. Ruggles* 27 Mich. 67; *Jackson v. People* 9 Mich. 112.

CAMPBELL, J. Hart was sued before a justice of the peace of St. Clair county for the amount of a small judgment collected by his deputy (he being sheriff) and not paid over. Having moved to quash for want of jurisdiction of the justice to entertain a suit by a municipal corporation, the motion was denied. He then pleaded, but subsequently got leave to withdraw his plea, and the case was tried, and

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judgment rendered for the township. Hart made no objection to testimony and allowed the case to go to judgment, and then sued out a *certiorari* to the circuit court, where the judgment was affirmed. He now brings error.

The objection to jurisdiction is not urged, and is not maintainable. Upon all the points in issue there appears to have been evidence, and the objection that it was not the best evidence can hardly be raised now, when the defendant deliberately abstained from objecting. Some technical points which do not relate to the merits we need not notice, as on such writs the statute requires all objections not going to the merits to be disregarded. The principal one of these seems to have been that the defendant was not sued by his name of office. But his liability being shown this was not a substantial objection.

The judgment must be affirmed with costs.

The other Justices concurred.

THE SUPREME COUNCIL OF THE CATHOLIC MUTUAL BENEFIT ASSOCIATION v. MARY PRIEST ET AL.

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Mutual benefit association—Bequest of beneficiary fund—Costs.

The rules of a regularly incorporated mutual benefit association provided that on the death of a member his share of the beneficiary fund should be paid to the persons named by him on the will book, and that if he named no one it should be divided equally among his family. The rules did not assume to take away the right to change the disposition of the fund. *Held*, where a member made a will after entering an order on the will book, that the will should be followed.

A beneficiary fund payable on the death of a member of an association to persons named by him, is not to be treated as part of his estate, subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries or to their guardians.

Costs were not granted as against the minor heirs where a decree disposing of a beneficiary fund was altered in favor of the widow who appealed.

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Appeal from the Superior Court of Detroit. Submitted June 22. Decided June 29.

BILL of interpleader filed to determine the right to a fund of $2000, being the amount due from the complainant association upon the death of John Priest, a member thereof. The complainant is a corporation existing under the laws of New York, and its rules provide that on the death of a member in good standing a beneficiary fund shall be paid "to the person or persons as named by the deceased and entered by his order on the Will Book." Priest directed that $100 should be given to his daughter Mary and $1900 to his wife, but reserved the right of changing beneficiaries or amounts or annulling them and appointing others in their stead or of entirely annulling the will and naming no beneficiary. He afterwards made an ordinary will revoking his former action and declaring that after his debts were paid he bequeathed to his wife out of the beneficiary fund the sum of $500 and divided the rest equally among his five children. The trial court held that the will operated as a revocation of the previous distribution, but that as it was not itself made in accordance with the rules of the association the fund must be distributed as if no order had been entered in the Will Book, and decreed that it should be divided equally between the family. The widow appealed. Decree modified.

James T. Keena and *Brennan & Donnelly* for complainant. A will may operate to revoke a former will though otherwise inoperative: *Scott v. Fink* 45 Mich. 241; a beneficiary fund is not assets which will go to an administrator: *Ballou v. Gile* 50 Wis. 614.

Otto Kirchner for appellant.

MARSTON, C. J. The record in this case is not as full, clear and distinct in some respects as we could wish it to be. We are unable to find anything in the act under which the complainant company was organized, or in the rules

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appearing in the record, which would take away from John Priest the right and power of disposing of this fund by last will and testament in the ordinary manner. While section 9 of the rules and regulations of the complainant provides that the fund on the death of a member shall be paid to the person or persons last named by the deceased, and entered by his order on the Will Book of the company, yet this does not, nor did the will as entered upon the complainant's books, attempt to deprive Mr. Priest of the right to make some subsequent disposition of the fund differing from that therein made. Indeed in the will made upon the complainant's books, full right was reserved to make a different disposition thereof. This was done by the second will, which does not, in our opinion, violate rule 9 of the complainant, and if it did we might not be prepared to hold the testator's disposition invalid because thereof. Very clear and binding provisions must be shown to deprive a person of the right given him by the laws of the land to dispose of such a fund by his last will.

In our opinion the provisions of this second will, in so far as it names the persons and the amount to which each shall be entitled, must govern. This being a beneficiary fund, does not become a part of the property or estate of the deceased subject to his debts, but is exempt therefrom in accordance with the provisions of the act of incorporation. It does not therefore go to the administratrix of the estate, but should be paid direct to the beneficiaries named, if of age, and if not, then to their legal guardians. The decree will be modified, so as to give Mary Priest, the appellant, the sum of five hundred dollars, and in all other respects the decree shall stand confirmed, and a decree to this effect, and directing the payment of the minor children's shares to their lawful guardians, will be entered in this court. This is not a case where costs should be allowed against the children and none will be.

The other Justices concurred.

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JOHN CHATTERTON v. GEORGE PARROTT.

Supreme Court's jurisdiction to review—Exceptions to judgment—Proceedings to condemn land—Juror's competency.

The Supreme Court has no power to review law cases upon the facts; its jurisdiction is limited to reviewing rulings of the trial court on such questions of law as were distinctly presented and passed upon.

A general exception to a judgment cannot entitle one to raise any question of law that could have been raised in the court below.

A mere exception to a judgment that is good in form can never be available to raise any question in the Supreme Court.

Where findings are made, an exception that they do not support the judgment can be considered in the appellate court.

A mere recital showing the facts of a case at law, the nature of the judgment and the fact that a party excepted to it presents no question for the Supreme Court, if there are no findings and the judgment is good in form.

One who has taken compensation for land condemned for a private way, cannot afterwards object to the validity of the proceedings on the ground of a juror's incompetency; it was his duty to inquire therein while proceedings were pending.

Case made from Kent. Submitted June 22. Decided June 29.

TRESPASS *qu. cl.* Defendant had judgment. Affirmed.

D. E. Corbitt for plaintiff.

Matheweon & Wurzburg for defendant. One who assents to the taking of his property for road purposes, and receives compensation, waives all objections based on constitutional rights: *Baker v. Braman* 6 Hill 47; *Heyward v. Mayor* 8 Barb. 486; and he must make objections to the competency of jurors when the latter are drawn: *Van Vliet v. Wilson* 17 Wis. 687; or he waives his right thereafter to recover damages for the use of the land taken from him under otherwise regular proceedings: *Hopkins v. Briggs* 41 Mich. 176.

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COOLEY, J. This appears to be a case made for review in this court after judgment for defendant in the Kent circuit. The action was trespass *quare clausum*, and the plea was the general issue, with notice that the *locus* was a private way, properly established as such by the public authorities. The case sets out the pleadings and proceeds to say that—

"The facts as proved by the evidence are as follows:

"1. On and previously to October 28, 1878, the plaintiff had been the owner of, and been in possession of the premises mentioned in the declaration.

"2. On the 4th day of September, 1878, the defendant and his wife made application to the proper authorities, in a lawful manner, to have a private way, two rods wide, laid across said premises.

"3. Thereupon notice, pursuant to law, was given plaintiff of such application, and also of a meeting to be held at defendant's house on the 21st day of October, 1878, at 10 o'clock A. M., by the commissioner, for the purpose of striking a jury to determine as to the necessity and propriety of such road.

"4. On the day and at the hour mentioned, the highway commissioner, town clerk and defendant and his wife, met at the defendant's house in pursuance of the notice, and the meeting was regularly adjourned until the 28th day of October, 1878, at 8 o'clock A. M., at the same place.

"5. On the 28th day of October, 1878, at the time appointed, the same parties, and the plaintiff with his attorney, met at the defendant's house, and proceedings were commenced to obtained a jury. Henry W. Booth, a constable, was duly sworn to write down the names of eighteen disinterested freeholders from which to select a jury. After such names had been written down, the plaintiff and the defendant each struck off three of the names; whereupon the commissioner issued a proper citation to the remaining twelve persons, whose names had not been stricken off, to act as a jury.

"6. The citation, having been delivered to the officer for service, was returned duly served upon nine of the persons therein named, three of said persons not being found. Thereupon the plaintiff and the defendant agreed that George Winslow, Arthur W. West and William Andrews might be summoned in the place of the three persons not found. It appearing further that said George Winslow could not be found, and that one of said original nine who

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were summoned was incompetent to act, the plaintiff and the defendant agreed that Isaac Brannon and George Broadbent should be summoned to act in their stead.

"7. Thereupon the constable having summoned the said jury, returned said citation duly served upon the following named persons: Henry Gould, Calvin Hull, John Yeiter, Isaac Van Oty, Charles Powley, James Brannon, Luther McConnell, Thomas Lowden, Arthur H. West, William Andrews, Isaac Brannon and George Broadbent, who were duly sworn well and truly to examine in regard to the necessity and propriety of said private road, and, in such case they should decide it a necessity, to justly and impartially appraise the damages, etc.

"8. The petition and the law having been properly read to the jury, said jury repaired to, and examined the premises, returned to Parrott's house, and after due deliberation (separate and apart) returned and decided, that after their said examination they found the road necessary and proper, and appraised Chatterton's damage at one hundred dollars.

"9. Then the defendant paid the jurymen their lawful fees, and they were discharged. Defendant then also placed in commissioner's hands, to be paid to plaintiff, one hundred dollars, being the damage appraised. All this took place on the 28th day of October, 1878, and on the 29th day of October, 1878, the commissioner of highways made a proper order that the private road be laid out as applied for. The proceedings to open and lay out the road as above set out, appear from the lawful record thereof, which was put in evidence, and the record closed with the receipt of John Chatterton for the hundred dollars damages, which was appraised by the jury, and which was paid to him by the commissioner.

"10. It also appeared from the evidence, that the defendant paid all the costs and charges incident to the opening of the road. It also appeared that during all the proceedings the plaintiff was present with his attorney, whom the plaintiff had taken there expressly on that matter, and participated therein, and made no objections to any of the jurymen, but left it to the men selected to assess the damages. The defendant, under the commissioner's orders, afterwards went upon the premises and opened the road, and used it thence and until the present time. He removed some fences and apple trees, offering the plaintiff to set the trees where plaintiff might direct; but the plaintiff replied, that they would be of no use to him, and he, plaintiff, did not want

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them. And it appears from the evidence that the defendant removed only such obstacles as was necessary to remove and open the road, and did no unnecessary damage.

"11. About eight or nine months afterwards, the plaintiff claimed that there was no road laid out across his premises, and he thereupon tendered to the defendant the $100 that had been paid him as the damage awarded, and forbid the defendant coming on the land any more. He did not tender back any of the other expenses or interest. The defendant refused to accept the one hundred dollars, but continued to go on the plaintiff's land and use the said road, and has continued so to do hitherto. The reason assigned by the plaintiff that the road was illegal, was that he had ascertained that two of the jurymen, who acted on the jury while laying out said road and assessing the plaintiff's damages, to-wit, Hull and Gould, were not freeholders at the time said road was laid out, that fact was proved on said trial that Calvin Hull and Henry Gould were not freeholders at the time that they acted on said jury, and that the said plaintiff did not know that fact; that the highway commissioner did know that Gould was not a freeholder, for Gould told him so, and the commissioner told Gould that it would make no difference, but the commissioner did not communicate the fact to any of the parties. It was also established that they were living in the neighborhood of the plaintiff, and he knew them, and it did not appear that the plaintiff or his attorney made any inquiries or efforts to ascertain whether or not said two jurymen were freeholders. It further appeared that said plaintiff had not kept the tender of one hundred dollars good at all times, and did not have that amount of money present in court. Afterwards, to wit, in the October term of said court, 1880, the said court rendered judgment in the said cause in favor of the defendant for cost.

"To which judgment the plaintiff did except."

This is the whole case. This Court does not review law cases on the facts, and has no power under the law to do so. Its jurisdiction is limited to a review of such rulings of the circuit court upon questions of law as were distinctly presented and passed upon. What rulings upon questions of law are to be found here? It is recited that the plaintiff excepted to the judgment; but why? So far as appears it was in due form of law, and it was the duty of the court to render it if the judge was of opinion that the plaintiff had made out no case. Perhaps the plaintiff supposed he would

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be at liberty to go back of the judgment and raise any question of law that might have been raised in the court below; but that is a mistake: we might if that were admissible be passing upon questions that were never called to the attention of the trial judge, and perhaps be reversing his judgment on points on which he would agree with us. A general exception to a judgment cannot be given any such sweeping effect.

In this case we do not know whether the circuit judge held the defendant entitled to a judgment because he considered the proceedings in laying out the private way valid, or because he held the plaintiff estopped by accepting the compensation awarded, or because having accepted it he had not kept good his tender of repayment, or because he had not effectually revoked his license, or for some other reason which seemed to him sufficient. No finding upon points of law was requested, and none was made. The judge merely tried the cause and rendered judgment, and the judgment is excepted to and nothing else. But this is futile: a mere exception to a judgment which is good in form can never be available. Had there been findings, an exception that they did not support the judgment might have been considered; but this case is nothing but a presentation of all the facts for our judgment upon them. We have no authority to express such a judgment.

This disposes of the case. Nevertheless as further litigation may arise, we have looked into the plaintiff's brief upon the merits, and find that he relies for the invalidity of the proceedings in laying out the way, upon the incompetency of two of the jurors. But after accepting the compensation awarded he was not in position to take such an objection. *Baker v. Braman* 6 Hill 47; *Embury v. Conner* 3 N. Y. 511; *Detmold v. Drake* 46 N. Y. 318; *Mobile etc. R. R. Co. v. State* 29 Ala. 586. It is of no importance that he failed to ascertain the incompetency in due season; his duty was to inquire into the facts while the proceedings were pending.

The judgment must be affirmed with costs.

The other Justices concurred.

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Wm. Messersmidt and Adolph Messersmidt v. People.

Abatement of nuisance—Criminal proceedings—Pollution of Stream.

Judgment for the abatement of a nuisance should not be rendered unless there is a specific finding of a present state of things showing its necessity. And an information which does not allege that it is a continuing nuisance will not support such a judgment.

Where an information for nuisance alleges that it arises from the use of things innocent in themselves, the case does not call for their destruction in order to effect an abatement, but for the discontinuance of the objectionable method of using them.

Where a common nuisance is alleged by a criminal charge, facts enough to support the allegation must be stated.

A charge that defendant polluted an ancient stream, thereby rendering the water unfit to drink "to the common nuisance of the people," must show that the stream is one in which the public has rights.

Error to Kent. Submitted June 23. Decided June 29.

Information for nuisance. The court below adjudged that defendants be fined and that the cause of the nuisance be removed. Reversed.

D. E. Corbitt and *John C. FitzGerald* for plaintiffs in error. An information for a public nuisance must show that it affects the public interests: *Commonwealth v. Webb* 6 Rand. 726; if it does not aver that it continue no ground is shown for a judgment of abatement: *Rex v. Stead* 8 Term 142; *Rex v. Justices of Yorkshire* 7 Term 463; judgment for the destruction of the cause of the alleged nuisance is erroneous if its destruction is not alleged to be necessary: *Shepard v. People* 40 Mich. 492; *Welch v. Stowell* 2 Doug. (Mich.) 332; *Bloomhuff v. State* 8 Blackf. 205; *State v. Kaster* 35 Ia. 221; *Brightman v. Bristol* 65 Me. 426; *Miller v. Burch* 32 Tex. 208; *Earp v. Lee* 71 Ill. 193; *State v. Keeran* 5 R. I. 497; Cooley on Torts 49; and if the proper remedy is merely to stop its use: *Barclay v. Com.* 25 Penn. St. 503; *Taggart v. Com.* 9 Harris

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(Pa.) 527; *Campbell v. State* 16 Ala. 144; *Moody v. Supervisors* 46 Barb. 659; *Gray v. Ayres* 7 Dana 375; *Ely v. Supervisors* 36 N. Y. 297; *Brown v. Perkins* 12 Gray 89; *State v. Paul* 5 R. I. 185; *Barnes v. Hathorn* 54 Me. 125; *Finley v. Hershey* 41 Ia. 389.

Attorney-General *Jacob J. Van Riper* for the people. Conducting an unwholesome trade is a nuisance: Tiffany's Crim. Law 836; 2 Whart. Crim. Law § 2389; *Robinson v. Baugh* 31 Mich. 290; if a nuisance has been abated before judgment for abatement can be executed, that part of the judgment cannot injure respondents: Whart. Crim. Law § 2368; *Wroe v. State* 8 Md. 416.

GRAVES, J. Plaintiffs in error were tried for having created a public nuisance. The information contained five counts; but the circuit judge confined the jury to the first and fourth, and a verdict of guilty was returned. Judgment was given that each of the accused should pay a fine of fifty dollars and that the sheriff, under the direction of the board of health, and at the expense of the defendants, should abate the nuisance.

In the recent case of *Shepard v. The People*, 40 Mich. 487, we suggested that before any judgment of abatement should be given there ought to be a specific finding of a present state of things showing not only the appropriateness but the necessity of a judgment of that kind. There is no occasion to repeat those observations.

In the case before us the reasons against such a judgment are very obvious. Neither count alleged the nuisance to be continuing, and there was no basis for proceeding to give judgment on the supposition that it was. *The King v. Stead* 8 Term 142; *The King v. The Justices* 7 Term 464. In the next place the charge was not that the nuisance consisted of something permanent, as a wall or a building. It was alleged to arise from the use which was made of certain things wholly innocent in themselves; and hence the only necessary expedient for getting rid of the nuisance would be, in case of its continuance, to stop the

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objectionable mode of use. The case was not one, therefore, where it would be proper to destroy the instruments in order to effect an abatement, and there was hence no case to which proceedings to abate through the act of the sheriff could apply. *The King v. Pappineau* Strange 686.

The fourth count alleged no offence. The substance of it is that the accused parties conveyed noxious matters from their glue works "into a certain ancient stream of pure water there situated and flowing," and thereby made the "water unfit to drink" "to the common nuisance of the people."

To lay a criminal charge, sufficient facts must be stated to denote it, and where the public offence is the rendering the water of a stream unfit to drink the charge ought to be set out with circumstances to show how it is that the public is interested or affected. Unless this is done the court cannot say that anything amounting to a crime is imputed. Now the count under consideration is wholly wanting in facts to justify the conclusion that the causing of the water in this stream to be unfit for drink was "to the common nuisance of the people." The stream is not described as one in which the public have any right. For aught that appears it may be a stream in which no one except the plaintiffs in error have any right whatever.

It is needless to go further.

The judgment must be reversed.

The other Justices concurred.

The People v. Samuel McKay.

Railway stations—Rights of expectorating passengers

Railway passengers are entitled to remain in the waiting room at a station as long as they have occasion to do so, and commit no offense against the good order of the place and reasonable regulations made to govern it; they are not bound to leave on being ordered out by the keeper for any such indecorum as spitting on the floor, and the refusal to go on being ordered will not excuse the commission of an assault and battery upon them to compel them to.

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A railway station keeper assaulted a passenger for not leaving the waiting room when ordered, the passenger having enraged him by spitting on the floor. *Held*, that in defending an action for the assault and battery a question as to the plaintiff's smoking was irrelevant, where his smoking had not been objected to.

Exceptions before judgment from Cass. Submitted June 23. Decided June 29.

INFORMATION for assault and battery. Respondent was convicted below. Affirmed.

Attorney General *Jacob J. Van Riper* for the People. Words cannot justify an assault: Tiff. Crim. Law 574.

Howell & Carr for respondent. The keeper of a railway station house is not guilty of assault in ejecting a person if he has no notice or knowledge of his right to remain there: *Com. v. Power* 7 Met. 596.

CAMPBELL, J. McKay was convicted of assault and battery on Thomas Cooley, at the Grand Trunk station at Edwardsburg, in Cass county. McKay was station keeper, and the assault originated in an altercation between them caused by Cooley's spitting on the floor. He was smoking at the time, but no objection was made to this, and a question about it was properly held irrelevant. The defendant made a somewhat violent assault, and subsequently called in another servant of the company who compelled Cooley to leave the room, which he had refused to do at the demand of McKay. Cooley was a passenger on a train stopping temporarily at the station.

The court charged the jury very distinctly that if Cooley violated any rule made either by the company or the agent which had been brought home to his knowledge, the respondent had a right to require him to leave the waiting-room, and to remove him by such force as was necessary.

We think this charge was quite strong enough in favor of respondent. It is absurd to claim that the traveling community are bound to govern their behavior by the whims of an obstinate station-house keeper, or to leave the room when-

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ever he thinks proper to drive them out. They are invited by the railroad company, and are entitled to remain there so long as they have occasion to do so, and commit no offence against the good order of the place and the reasonable regulations made to govern it.

The conviction was regular, and it must be certified to the court below that the people are entitled to judgment on it.

The other Justices concurred.

PEOPLE v. JOHN JONES, *alias* JOHN CONNOR.

Picking an empty pocket.

The fact that there was nothing to take is no defence to a prosecution for an attempt to commit a larceny from the person.

Exceptions before judgment from the Recorder's Court of Detroit. Submitted June 23. Decided June 29.

INFORMATION for an attempt to commit larceny from the person. Respondent was convicted below. Conviction sustained.

Attorney General *Jacob J. Van Riper* for the People.

Daniel E. Prescott for respondent. Conviction for an attempt to commit larceny is erroneous if it did not appear that there was anything to be taken: 1 Bish. Crim. Law § 671; *Reg. v. Collins* 1 Leigh. & Cave 471.

MARSTON, C. J. The respondent was charged with and convicted of an attempt to commit a larceny from the person, and the proof tended to show that he had put his hand into the outside cloak pocket of Emma Bellair; that there was no property of any kind in the pocket at that time and nothing therefore was taken therefrom. It was claimed that under such circumstances he could not be convicted.

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We are of a contrary opinion. The charge is of an attempt to commit a crime. In burglary, and many cases of attempts, the intent is gathered from the taking or other act done. But this is not the only way of proving the intent; if it were, in many cases attempts to commit crime would go unpunished.

We fully concur in the views expressed by the Massachusetts court in *Com. v. McDonald* 5 Cush. 365. We think this is not only the better, but the only rule of law that could be adopted or recognized with safety to the rights of the public or of individuals.

It must be certified to the Recorder's Court that we discover no error in the record, and that court is advised to proceed to judgment.

The other Justices concurred.

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THE PEOPLE v. ORANGE A. CARRIER.

Excusing juror—Peremptory challenge—Guardianship of young girls—"Enticing" away females—Previous illicit relations.

A juror may be excused at any time before he has been sworn, for any reason personal to himself which seems sufficient to the judge. So *held* where the excuse was that he was a witness in the next case on call.

A juror who has taken his place in the jury-box, and with whom both parties profess to be satisfied, can yet be peremptorily challenged by the prosecution before he is sworn.

Comp. L. § 7533 providing for the punishment of any person who for purposes of prostitution shall entice away a female of less than sixteen from her father, mother, *guardian or other person* having the legal charge of her person, covers cases of girls who are living in a family with the knowledge of a parent who does not object, or who has delegated the charge of the girl to the head of the family. It also applies to girls who are not under strict legal guardianship, but are orphans or abandoned by their parents and are given a home by charitable persons.

All girls under sixteen and not leading depraved lives are presumptively in the legal charge of some one.

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The statute punishing the enticing away of a female (Comp. L. § 7583) applies where the defendant accomplishes his purpose while he artfully avoids making her a direct proposition to go away with him.

In a prosecution for enticing a female away for purposes of prostitution evidence of previous illicit relations and of the subsequent conduct of the parties is admissible as bearing upon defendant's intent in enticing her away.

Evidence of former illicit relations is significant though not conclusive in its bearing upon the intent of one who is charged with enticing away a female for prostitution; but it may properly be dispensed with where proof of their subsequent conduct is conclusive as to the unlawful intent.

Exceptions before judgment from Calhoun. Submitted June 23. Decided June 29.

INFORMATION for enticing away a female. Respondent was found guilty below. Conviction sustained.

Attorney General *Jacob J. Van Riper* for the People. Challenges to jurors may be made at any time before the jury is sworn: *Jhons v. People* 25 Mich. 499; *Hunter v. Parsons* 22 Mich. 96; one may be prosecuted for enticing away a female even when she has no legally appointed guardian: *Iowa v. Ruhl* 8 Ia. 452; if respondent had such an influence over the girl that she went without express enticement he may still be convicted: *People v. Bristol* 23 Mich. 126.

John Atkinson and *Sidney Thomas* for respondent. A juror cannot be arbitrarily withdrawn or excused without sufficient cause: *State v. Shaw* 3 Ired. 536; *Boles v. State* 13 Sm. & M. 398: 24 Miss. 453; a widow who re-marries thereby loses control of a minor child: *Williams v. Hutchinson* 5 Barb. 122.

COOLEY, J. The charge on which the defendant has been convicted is of having, in the month of May, 1879, feloniously taken and enticed one Jennie L. Hendricks, a female under the age of sixteen years, from and without the consent of James Barry, her guardian, who had the legal charge and

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custody of her person. In different counts of the information his intent is charged to have been for the purpose of prostitution, of concubinage and of marriage. The case comes up for review on exceptions before sentence.

1. The first exception is to the action of the court in excusing a juror. The record states that one John Blake, having the qualifications of a juror of said county, was summoned as a talesman, "to whom no challenge or objection was made by either party, whereupon said Blake stated he was in attendance at said court as a witness in a case yet to be tried at said term, and the next case on call," whereupon the judge excused him and the defendant excepted. The exception has no merit. Before a juror has been sworn in the case, the judge may excuse him for any reason personal to the juror which seems to the judge sufficient. This was recognized in *Atlas Mining Co. v. Johnston* 23 Mich. 36, but it needs no authority.

2. The prosecution was also permitted to challenge peremptorily a person who had once been placed in the jury-box, both parties saying they were satisfied with him. He had not been sworn, and there is no doubt of the right to make the challenge. It was said on behalf of the defendant at the argument that the defendant had at the time exhausted his peremptory challenges. Whether that would make any difference we need not consider, as the record does not show the fact.

3. The principal exceptions relate to the right of Barry to be regarded as the legal guardian of the person of the girl for the purposes of the prosecution. The evidence tended to show that the father of the girl was dead or supposed to be dead; that the mother was living with another man as his wife, but whether legally married to him did not appear; that the girl was living in Barry's family; and that on November 29, 1878, on the petition of the girl, who was then over fourteen years of age, the judge of probate of Calhoun county appointed Barry to be her guardian. In the petition Jennie states that she is possessed of no estate, "but that it is necessary a guardian should be appointed for said minor

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for the purpose of taking care of the interest of said minor in her person." The order of appointment was the usual order which is made for the guardianship of property, and it is objected that it gave no legal control of the person. But the fact that Jennie lived in the family of Barry after the appointment with the consent or at least with the knowledge and without the objection of the mother was proved, and that she continued there until the time of the alleged offense. The necessaries of life were supplied to her in the mean time by Barry, as they were to other members of his family.

The circuit judge charged the jury that the letters of guardianship did not make Barry the guardian of the girl's person, but that they were properly in the case for the bearing they might have on the actual custody. But he further instructed them that the parent having a right to the custody of a child may delegate the authority; that this right was primarily in the father, but in his absence belonged to the mother, who may if she see fit give the custody to a third person for a longer or shorter period, resuming the control at will; that it was not necessary in this case that Barry's right should be of that character that the mother would be precluded from resuming her control; it was enough if, while the girl lived at Barry's, the mother had consented to his exercising the same control over her in respect to her liberty that the mother herself could exercise for the time being. If she had done so, and had not revoked that permission, then Barry had that right to the custody and control which in contemplation of law amounts to a legal charge of the girl.

We fail to discover any just ground of objection to this instruction. The statute provides that "Every person who shall take or entice away any female under the age of sixteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of prostitution, concubinage, or marriage, shall be punished," etc. This plainly contemplates that there may be a legal charge in one who is neither

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parent nor guardian, but who under the facts of the case stands in the place of one or the other. It is the actual state of things and not the existence of a legal relation that the statute contemplates; and an orphan adopted into a family without legal guardianship, or a girl abandoned by her parents and given a home by charitable persons, is as much within the reason and intent of the statute as any other female. The protection was meant to be general; and presumptively every female within the age indicated, who has not already abandoned herself to a depraved life, is in the legal charge of some one. Barry, under the facts shown, had unquestionably the legal charge of this girl; and neither the court nor the jury erred in the conclusions arrived at.

4. It was also insisted that there was no evidence to go to the jury tending to show that the defendant enticed the woman from Barry's custody, or that if he did, his purpose was either prostitution, concubinage or marriage. The facts were that defendant induced a brother of the girl to persuade her to meet him at a place away from Barry's house, and that after the interview which there took place the girl went off at once to Canada. How far, if at all, this was induced by the persuasions of the defendant was left to the jury on the facts. As throwing light upon the intent the prosecution was allowed to show that the girl had previously lived with defendant in illicit relations in Canada. The defendant claimed that the evidence showed the girl herself proposed the action which she took, and that the defendant in seeking for the interview had no other motive than to explain to her his conduct and motives in another transaction in respect to which it was expected her evidence was to be used against him. The circuit court charged the jury that before they could convict they must be satisfied the defendant enticed the girl away. "It may have been done by open solicitation to go for one purpose or for another purpose. It may have been done by designedly portraying to her her situation, and the result of going back to Mr. Barry, or the place from which she came, in such a light as to lead her to go to escape a return. If this were done with the

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design of getting her to go, it is an enticing, although the defendant may not have asked her to go, and apparently only consented to go with her; but if he had no design to get her to go away, and did nothing to bring about such an end, it would not be an enticing, and the defendant could not be convicted."

This instruction was correct. A man cannot be suffered to evade the statute by artfully avoiding a direct proposition that she go off with him, when his conduct is equivalent to such a proposition, and not only suggests it to the girl, but is calculated and designed to induce her to go. The judge also instructed the jury that the previous relations of the parties might be considered as bearing upon the intent of the defendant in enticing the girl away. This also was correct. The previous relations of the parties were not conclusive, but they were very significant. *People v. Jenness* 5 Mich. 305. It may be added, however, that the evidence of subsequent conduct was so conclusive of the unlawful intent that the proof of previous misconduct might well have been dispensed with.

Other rulings of the court were criticised on the argument, but we see no occasion to discuss them. No error in law was committed, and the record gives no indication of any want of fairness or impartiality on the part of either court or jury.

It must be certified to the circuit court that judgment should be rendered on the verdict.

The other Justices concurred.

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ALONZO B. RAYMOND ET AL v. ALVAH E. LEAVITT.

Account stated—Gamblers in wheat.

A statement is not, in law, an account stated, if neither party agrees to it.

One who lends or advances money to be used for the purpose of making a corner in wheat cannot recover it back by any legal measures.

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Error to Wayne. Submitted June 23. Decided June 29.

Assumpsit. Defendant brings error. Reversed.

Otto Kirchner and *C. A. Kent* for plaintiff in error. A stated account is an *agreement* between the parties that all the items are true: *Stebbins v. Niles* 25 Miss. 267; both parties must assent to the correctness of the account: *Stenton v. Jerome* 54 N. Y. 480; *Kock v. Bonitz* 4 Daly 117; the assent of one is not enough: *White v. Campbell* 25 Mich. 464; money paid in furtherance of an illegal transaction cannot be recovered back: *Dixon v. Olmstead* 9 Vt. 310; *Foote v. Emerson* 10 Vt. 338; *Langton v. Hughes* 1 M. & S. 592; *Wheeler v. Russell* 17 Mass. 258; *Kingsbury v. Flemming* 66 N. C. 524; *McKinnell v. Robinson* 3 M. & W. 434; combinations to raise the price of necessaries are unlawful: *Arnot v. Pittston & Elmira Coal Co.* 68 N. Y. 558; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Penn. St. 173; the illegality of a claim is not removed by making an account of it: *Keane v. Branden* 12 La. Ann. 20.

Henry M. Cheever for defendant in error. It is only necessary to an account stated that the party charged admits a certain indebtedness: 1 Chitty Pl. 358; *Porter v. Cooper* 4 Tyr. 264; *Breckon v. Smith* 1 Adol. & Ell. 488; *Stevens v. Tuller* 4 Mich. 387; *Gooding v. Hingston* 20 Mich. 441; *Trueman v. Hurst* 1 Term 42; *Dawson v. Remnant* 6 Esp. 24; *Fitch v. Leitch* 11 Leigh 471; a firm is liable for money borrowed to be used in its business whether it was so used or was misappropriated; *Church v. Sparrow* 5 Wend. 223; *Vienne v. Harris* 14 La. Ann. 382; *Onondaga v. DePuy* 17 Wend. 47; *Whitaker v. Brown* 16 id. 505; *Saufley v. Howard* 7 Dana (Ky.) 367; its recovery would not involve the enforcement of an illegal contract: *Willson v. Owen* 30 Mich. 474.

Campbell, J. Leavitt sued plaintiffs in error on the common counts and served a bill of particulars in which the demands were set out under different forms and items as

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$10,000 money lent, $10,000 handed defendants for their use on their guaranty that it should be repaid in a reasonable time, $10,000 deposited with them for their accommodation, and $2327.53 on account stated. He recovered $3027.53, which is claimed on the argument to have been made up by the sum of what is called an account stated, and an error of $700.

The plaintiff's story on oath was that the sum of $10,000 was advanced by him in May, 1880, to defendants for the purpose of controlling the wheat market at Detroit for what is called by the parties the May deal, with a view of forcing up prices, and producing what is understood as a corner, and compelling parties who had contracts to fill to pay a higher price for wheat to fill them. Defendants, as he testified, were to give him a third of the expected profits, and to repay the $10,000 with or without profits at all events.

Defendants claimed that Leavitt furnished the $10,000 as a margin for these wheat transactions, and was to bear his risks, and that the speculations resulted in a loss.

At the end of July, 1880, defendants gave plaintiff three documents or statements, exhibiting transactions up to that time, in which he was treated as a party concerned in the transactions, and one of these papers showed in a brief way that at that time there was left of his share no more than $2327.50. This is now claimed to be an account stated.

Several special questions were left to the jury and they found that there was no loan made, and that defendants, when they rendered these statements, understood the business was closed. They also negatived the giving of the money for the purpose of contracting for more wheat than could be delivered, and thus artificially raising the price.

If the testimony is properly printed, it does not appear distinctly that any one swore the purpose was merely to raise the price of wheat so as to get the advantage of those who should agree to sell to defendants themselves, but rather to so raise it as to compel all persons, who had wheat to deliver to anybody, to pay larger prices. The answer given by the jury does not fully meet the testimony.

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We do not understand on what basis plaintiff recovered under his bill of particulars. He never advanced to defendants any sums except two $5000 items, amounting to $10,000. If there was any money to be returned under his particulars it could have been no less than $10,000. On the other hand both parties repudiated the idea that they had ever agreed on the July bills or any of them, as settling the amount due from one to the other; and there cannot be in law an account stated that neither party agrees to. It is impossible to support the judgment on any theory of the evidence that conforms to the demands of either party.

But the defendants, both at the close of plaintiff's case and at the close of the whole testimony, asked for instructions that the plaintiff should not recover, and in our opinion they should have been given.

The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal. But it is enough to make them so questionable that very little further is required to bring them within distinct legal prohibition.

The cases of *The Morris Run Coal Co. v. Barclay Coal Co.* 68 Penn. St. 173, and *Arnot v. Pittston & Elmira Coal Co.* 68 N. Y. 558, held contracts involving similar dealings with coal, to be against public policy. And we think the reasoning of those cases is based on familiar common-law principles, which apply more strongly to provisions than to any other articles.

There is no doubt that modern ideas of trade have practically abrogated some common-law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contem-

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plated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our states have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law of such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was considered that enough remained of the common law to punish combinations to enhance values of commodities. And when this doctrine became narrowed, it seems to have been considered that such combinations to enhance the price of provisions remained under the ban.

In *Rex v. Waddington* 1 East 143, and s. c. 1 East 167, it was held the common law was still in force to punish engrossing the necessaries of life or provisions by single persons. The chief difficulty was in determining whether hops came within that rule, and it was held they did, and that the Legislature only could change the law. The defendant was heavily fined. That case has been sharply criticised as not in harmony with modern political economy, and it no doubt goes beyond what would be considered proper among us. It has never, so far as the researches of Mr. Bishop have gone,—and he seldom over-looks important cases,—been judicially disapproved, although statutes have been made to change the rule. See 1 Bish. Cr. L. §§ 527, 528, and notes to 6th edition. And he intimates that conspiracies for such purposes may perhaps be punished, even where the individual offence has been abolished. See also, vol. 2, §§ 202, 206, 216, 220, 230, 231 and notes.

In *Rex v. Hilbers* 2 Chitty 163, it was held that there must be a combination of more than one person before an information will be granted for enhancing the price of necessaries.

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Mr. Russell gives it as his opinion that in our day single offenders would not be regarded as punishable unless their offence relates to provisions. 1 Russ. 170. But where there is a conspiracy the law has been given a much wider application, and the case of *Rex v. De Berenger* 3 M. & S. 67, has obtained celebrity from the high rank of the offenders who were convicted,—(and one of them at least, Lord Cochrane, unjustly)—of conspiring to raise the price of stocks by false rumors.

We have not referred to these cases to assert the propriety of enforcing common-law criminal penalties contrary to the general understanding of the business community. While these offences have never been abolished in this State by statute, and might theoretically be, therefore, within the possible range of our laws, there would be no toleration of their strict prosecution against single persons to the common-law extent as crimes.

But the general sentiment has not led to any change in legislation or to any recognition of the legal propriety of allowing every species of produce gambling to be made susceptible of enforcement by contract. We must wilfully shut our eyes before we can fail to see that a combination between a man who furnishes money and dealers who manipulate the market, where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it.

We do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of common-law offences, is referred to in the case in 68 N. Y. as rendering such conspiracies unlawful, and this had been previously held in *People v. Fisher* 14 Wend. 9, where the subject is discussed at length. There may be difficulties in determining con-

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duct as in violation of public policy, where it has not before been covered by statutes or precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land, and we cannot save the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose the Legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized; and until the law is changed we shall decline enforcing such contracts. If parties see fit to invest money in such ventures they must get it back by some other than legal measures.

Judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

KARL SCHMEMANN v. JOHN ROTHFUSS.

Assumpsit against collecting agent—Conversations—Costs as damages.

Where an agent, intrusted with the collection of debts and foreclosure of mortgages, seeks to deceive his principal by representing that payments have not been made on a mortgage, the latter can maintain *assumpsit* on the common money counts against him for moneys received in making collections thereon and for moneys advanced to be used in foreclosing it. And it is proper to examine plaintiff as to every conversation had with defendant in regard to the transaction in controversy especially where it is claimed that he tried to prevent plaintiff from having an interview with the mortgage debtor.

Costs were awarded defendant in error by way of damages for the delay caused him by taking the case up on frivolous assignments of error.

Error to the Superior Court of Detroit. Submitted June 23. Decided June 29.

ASSUMPSIT on the common money counts by Rothfuss against Schmemann for money had and received as Rothfuss' agent in making collection on a mortgage which he had

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negotiated for Rothfuss, and for moneys advanced by Rothfuss to carry on its foreclosure. There was testimony tending to show that Schmemann had deceived Rothfuss as to payments made and that Rothfuss had directed him to foreclose upon his representations that the interest had not been paid when in fact it had been. Plaintiff was examined as to what Schmemann had told him as to interest and as to his paying Schmemann for his disbursements in foreclosing, and was allowed to testify under objection as to whether he had had any farther conversations with Schmemann. The jury found for plaintiff and defendant assigns error upon the admission of the testimony referred to and upon the judge's refusal to charge that plaintiff could not recover in that action the moneys paid defendant and allowed to be retained by him on account of services and disbursements in the foreclosure. Affirmed.

DeForest Paine for plaintiff in error.

Otto Kirchner, for defendant in error, cited in support of the right of action: *Dupen v. Keeling* 4 C. & P. 102; *Robson v. Eaton* 1 Term 62.

Marston, C. J. We can discover no valid objection to the question asked the witness Rothfuss, the plaintiff, as set forth in the first assignment of error. The plaintiff could properly be interrogated as to each and every conversation he had with the defendant regarding the transaction in controversy. Especially is this so in the present case where it was claimed, and evidently not without reason, that the defendant was endeavoring to deceive the plaintiff and prevent him from having any interview with his debtor.

The second assignment of error relates to the refusal of the court to instruct the jury according to the defendant's request. This was fully covered in the instructions given. In substance the instructions given were that if the plaintiff at the time the payment referred to was made, knew that the interest due upon his mortgage had been paid, and that his instructions to the defendant Schmemann were to fore-

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close because of non-payment of the principal, under such circumstances he could not recover back the balance paid by him for services in the foreclosure. The court also instructed the jury, and very properly, that if the plaintiff in this case was informed by Schmemann that the interest had not been paid him, when in fact it had, and Schmemann was thereupon instructed "if this interest is not paid, go on and foreclose," and the mortgage was foreclosed not because of non-payment of interest, that for such services payment made might be recovered back, if made in ignorance of the facts. Indeed, a pretty clear case is required to enable a party to retain the profits derived from his own wrongful and deceitful act.

The judgment will be affirmed with costs, and an additional allowance of thirty dollars will be made the defendant in error for the damages sustained by him in consequence of the delay in bringing this case here; the errors assigned being considered frivolous.

The other Justices concurred.

Frederick Rider v. Christian Kern.

Question of fact as to ownership.

The Supreme Court has no right to weigh evidence in law cases

A man sued another for the value of a beer wagon, which plaintiff claimed to own, but which defendant had bought from plaintiff's stepfather. The evidence tended to show that the seller was the original owner, but that the plaintiff had authorized his mother to use his money in buying it in from a man who had bought it on a foreclosure against the stepfather. The purchaser had also been garnished by a creditor of the stepfather and compelled to pay him all that remained unpaid of the purchase price. *Held*, that the case was for the jury, and that plaintiff was entitled to have their judgment on his presentation.

Error to St. Clair. Submitted June 23. Decided June 29.

Assumpsit. Plaintiff brings error. Reversed.

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DeForest Paine for plaintiff in error.

E. G. Stevenson for defendant in error.

GRAVES, J. Rider sued Kern before a justice of the peace for the value of a beer wagon and the cause was appealed to the circuit court. On the evidence being closed the circuit judge directed a verdict for the defendant and the question is whether there was anything on which the plaintiff was entitled to have the consideration of the jury. One Fahsnacht, the plaintiff's stepfather, owned the wagon originally and finally sold it to Kern. Kern paid $5 in money and some twenty or twenty-five dollars in beer. When this trade was made Fahsnacht said nothing about any interest in Rider, and Kern swears that he supposed Fahsnacht owned the wagon and that he was selling exclusively on his own account. The claim set up by Rider is that some time prior to this bargain, the wagon was taken by one Crawford from Fahsnacht on a mortgage and sold and bid in by Crawford; that Rider's mother held for his security a certain amount of his savings and requested him to authorize her to buy the wagon for him and pay therefor out of said moneys in her hands, and that he consented and the wagon was so purchased accordingly; that he subsequently authorized his stepfather Fahsnacht to sell the wagon for him and that Fahsnacht thereupon made the sale to Kern; that payment being delayed he called on Kern who informed him that he had the money on hand, but as he made the purchase of Fahsnacht and without notice that anybody else had any interest he would not pay any more until he was satisfied who was entitled to the money.

The claim on the part of Kern is that Fahsnacht was the real owner and that the claim of plaintiff is fraudulent. He also insists that shortly after his purchase he was garnished by a creditor of Fahsnacht and was adjudged liable for the entire amount back on the price of the wagon, and was compelled to pay and did pay the amount on the judgment against him as such garnishee. There was evidence tending to maintain each of these conflicting claims and the case

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presented a controversy of fact which it was not competent for the court to either decide or ignore. The plaintiff was entitled to have his version settled by the jury and the judge erred in taking the case from them. The reasoning in support of the ruling implies a right in the court to weigh the evidence; but we cannot suppose counsel to be serious in the invitation to listen to an argument of that sort.

The judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

ALPHONSE ROSE v. JOHN VERTIN.

Bishop not liable for payment of priest's salary.

A bishop is not liable for the salary of a priest whom he has engaged; they are fellow servants of the church for which the bishop acts merely as a superior agent, and not as a principal.

Error to Marquette. Submitted June 24. Decided June 29.

ASSUMPSIT. Plaintiff brings error. Affirmed.

F. O. Clark for plaintiff in error. A minister seized of parsonage lands in the right of the parish is a sole corporation for this purpose: Ang. & Ames on Corporations § 27; *Brunswick v. Dunning* 7 Mass. 447; *Weston v. Hunt* 2 Mass. 501.

W. P. Healy for defendant in error. The local congregations in Illinois and Iowa are incorporated under the State laws: *St. Patrick's Roman Catholic Church v. Abst* 76 Ill. 252; *Hubbard v. German Catholic Congregation* 34 Iowa 31; where there is no corporation those who deal with the church must trust to the good faith of the members: *Meth. Church of Newark v. Clark* 41 Mich. 737; the support of priests is a duty of the congregation: *O'Hara v. Stack* 90 Penn. St. 491.

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GRAVES, J. The plaintiff sued in character of assignee and owner of a claim of Joseph F. Bernbe for $300 on account of services by said Bernbe as a priest in the now diocese of defendant. A verdict in defendant's favor was ordered by the court. Bernbe was placed in duty as an officiating priest by defendant's predecessor, Bishop Mrack, and the entire claim in suit arose during that bishop's time and before the defendant came in. The main facts in the case are undisputed and the only question is concerning their effect, and in my opinion they show distinctly that the relation between Bishop Mrack and the priest was never that of hirer and hired in any sense implying an obligation on the bishop to pay the priest. The bishop was the priest's superior and according to the established order of things in the economy of the church government, regulating the degrees of subordination and the methods of administration, it was the province of the bishop to designate the place for the priest to exercise his functions, and prescribe under certain limitations the rules and precepts for his guidance and control. But both were common servants of the church, and the service of the priest was not a service for the bishop, nor was the bishop in respect to the employment a principal. In the course of administration the bishop assigned the priest to a theater of duty and gave him certain rules and instructions, and it was manifestly understood on both sides that the bishop was not to be responsible in law for the salary. On the contrary the conclusion from the facts is unavoidable that the council of the congregation, on whom the diocesan regulations cast the duty to provide support for the clergy, were wholly trusted to supply the necessary means to pay the plaintiff's assignor. It was surely competent for Bernbe to serve in reliance on that resource and run the risk of failure and there is no doubt that he did so. Exactly similar arrangements are taking place every day. Men are constantly going into positions under appointment by superior agents and where no liability for compensation rests on the employing agent and the means of payment, if they come at all, are to come from another source.

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Cases of illustration are infinite. They abound in business operations, and marked instances may be seen in the great missionary enterprises which are carried on. No one supposes the existence of a legal liability on the part of the appointing agency.

This view decides the case and makes it unnecessary to discuss the question whether in any event the present bishop could be held as the successor of Bishop Mrack.

The judgment is affirmed with costs.

The other Justices concurred.

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The Detroit Post & Tribune Company v. Cornelius J. Reilly, Augustus H. Phelps and Louis Selling.

Garnishment of judgment in action for libel.

A recovery for libel does not furnish an indebtedness which can be garnished until judgment is entered on the verdict.

Appeal from the Superior Court of Detroit. Submitted June 24. Decided June 29.

Bill of interpleader. Complainant appeals. Affirmed.

C. A. Kent for complainant.

C. J. Reilly for defendants.

Marston, C. J. The defendant Phelps recovered in the Superior Court of Detroit a verdict against the complainant on the 24th day of January, 1881, upon which judgment was entered March 12th. January 27th, 1881, a writ of garnishment was sued out of the Wayne circuit by Louis Selling who claimed to be a creditor of Phelps, and such writ was on the same day served upon the complainant. February 11th, 1881, the complainant filed its disclosure, and on the 16th of February a demand of trial was filed by the garnishee plaintiff in such garnishee suit. March 10th, 1881,

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complainant was notified that the verdict above mentioned had been, on the 25th day of January, 1881, assigned to the defendant Reilly. The complainant thereupon filed its bill of interpleader in the Superior Court against these defendants, Reilly, Phelps and Selling, and an injunction was issued restraining the collection of such judgment and the prosecution of the garnishee suit. The injunction was afterwards set aside because the amount of such judgment had not been paid into court; but this having afterwards been done the injunction was renewed. A motion was afterwards made to dissolve the injunction and an order made granting the motion, and from this order the complainant appealed.

The suit in which the verdict and judgment against the complainant were rendered was for a libel. In such a case until a judgment was entered up on the verdict there was no indebtedness that could be garnisheed. *Hill v. Bowman* 35 Mich. 191. As the garnishee proceedings were commenced after verdict but before judgment the complainant herein is not at all likely to be injured thereby.

The order appealed from will be affirmed with costs.

The other Justices concurred.

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ERASTUS L. NORTON v. WILLIS S. ROCKEY.

Animals taken damage feasant—Waiver of notice to owner—Trover—Replevin—Assessment of damages—Trespasses ab initio.

Trover will not lie for an animal taken *damage feasant* and detained by the injured party—there being no pound in the township—if the owner is notified, or otherwise ascertains the animal's whereabouts, and the cause of its detention within twenty-four hours, and refuses to pay reasonable damages. Comp. L. ch. 214.

Notice to the owner of an animal that it has been taken *damage feasant* and impounded, is waived by the owner if he discovers the facts within the time allowed for giving notice, and refuses to pay lawful damages.

A suit puts in question only such rights as existed when it was begun, and acts making defendant a trespasser *ab initio* must appear to have

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been done before suit to justify striking out evidence that would otherwise establish a defence.

Replevin will lie for an animal detained by one who has taken it *damage feasant* if the amount of damages demanded is excessive; or the owner is allowed to have the damages assessed by disinterested persons. Comp. L. §§ 6777, 6784.

Error to Eaton. Submitted June 24. Decided June 29.

TROVER. Defendant brings error. Reversed.

Cobb & Baird for plaintiff in error. Trover will not lie for animals lawfully distrained though subsequent proceedings have been irregular: *Johnson v. Wing* 3 Mich. 163; *Campau v. Konan* 39 Mich. 362; *Hamlin v. Mack* 33 Mich. 103; nor will trover lie at common law unless proper compensation has been tendered for damage done: Addis. on Torts 669.

Huggett & Shriner for defendant in error. One who distrains beasts doing damage, but does not comply with statutory provisions afterwards, becomes a trespasser *ab initio* and trespass or trover will lie for the distraint: *Pratt v. Petrie* 2 Johns. 191; *Sackrider v. McDonald* 10 Johns. 253; *Merritt v. O'Neil* 13 Johns. 477; *Morse v. Reed* 28 Me. 481; *Adams v. Adams* 13 Pick. 384; *Sherman v. Braman* 13 Metc. 407; *Merrick v. Work* 10 Allen 544; *Donovan v. Vicksburg* 29 Miss. 247; *McNeeley v. Hunton* 24 Mo. 281; *Bayless v. Lefaivre* 37 Mo. 119; *Sutton v. Beach* 2 Vt. 42.

COOLEY, J. Rockey sued Norton in trover for the conversion of a horse. No question appears to have been made on the trial that Rockey owned the horse, but Norton claimed to have impounded him *damage feasant*, and he also insisted that the right to bring suit had been cut off by a sale of the horse on an execution against Rockey, which was levied subsequent to the impounding.

The evidence tended to show without dispute that Norton found the horse in his corn-field doing damage, and that he took him and put him into his barn. The date when this

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occurred is not shown. The horse was taken up towards night, and the next morning Rockey went to take it away. How he knew where to go for it does not appear. Norton did not know the horse when he took it up, and had given no notice. Rockey went into the barn, unhitched the horse and started to go away with it, when Norton stopped him and demanded a dollar for his damages. Rockey said he had but fifty cents and would pay no more. Thereupon Norton prevented his taking the horse away. The evidence tends to show that the damage done by the horse was more than Norton claimed. Rockey went away and brought suit, but the evidence does not show how soon.

The first question requiring notice is whether trover will lie on this state of facts. The statute (Comp. L. ch. 214) recognizes the right to impound beasts doing damage, and provides that if there shall be no public pound within the township, the beasts shall be impounded in some suitable place under the immediate care and inspection of the person impounding them. § 6773. The evidence tended to show there was no public pound in the township. The statute further provides that the person impounding shall within twenty-four hours give notice to the owner or person having the care and control of the beasts, if known and living within six miles of the place of impounding, which notice shall contain a description of the beasts and a statement of the time, place and cause of impounding. § 6774. The twenty-four hours had not expired when Rockey went to take his horse away, and so far as appears from the record Norton was then lawfully detaining the horse. What took place on that occasion accomplished all the purposes of the statutory notice, for it put Rockey in possession of all the facts, and when he went away refusing to pay the damages, he must be deemed to have waived the formality of notice.

If Rockey was dissatisfied with the sum demanded by Norton, the statute gave him a right to an assessment by disinterested persons, § 6777; or he might replevy the horse and have the damages assessed in the replevin suit. § 6784 *et seq.* But he was not entitled to bring trover because of the original impounding and refusal to deliver.

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The circuit judge struck out all the evidence relating to the impounding. The reasons for this ruling are not stated in the record, though it is inferable that it was because the statutory notice was not given. It may be that he was of opinion the subsequent acts or neglects of Norton had rendered him a trespasser *ab initio*, and deprived him of the protection to which he was entitled at first; but to make such acts important it must appear that they were done before suit was instituted. The suit only puts in question the rights of the parties as they then existed. Apparently the ruling striking out the evidence was erroneous, and we cannot tell from this record whether the facts or neglects occurring subsequent to the impounding should or should not affect the suit.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Mary Ann Miller v. The Amazon Insurance Company.

Fire insurance—Statement of interest—Assignment without consideration.

A fire insurance policy stipulated that it should be void if the interest of the assured were other than "the entire, unconditional, free and unencumbered ownership." The applicant for insurance had only an undivided half interest in the property, having transferred the other half to his son, who had mortgaged it to his mother, and afterward assigned it for the benefit of creditors. The applicant went to the assignee and to the mortgagee, to obtain their interests, and they told him verbally that he could have them, and upon these assurances he had the property insured. *Held* that, as no consideration appeared for the transfer of their interests, the policy was void.

Error to Bay. Submitted June 24. Decided June 29.

Assumpsit. Plaintiff brings error. Affirmed.

Shepard & Lyon for plaintiff in error. The equitable title to property is enough to support the statement that it

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belongs to the applicant for insurance: *Kronk v. Birmingham Fire Ins. Co.* 91 Penn. St. 301; *Pelton v. Westchester Fire Ins. Co.* 77 N. Y. 605; *Dolliver v. St. Joseph F. & M. Ins. Co.* 128 Mass. 315; *Richmond v. Niagara Fire Ins. Co.* 79 N. Y. 230; courts abhor forfeitures where there is not fraud: *Appleton Iron Co. v. British American Assurance Co.* 46 Wis. 23.

McDonell & Mann for defendant in error.

GRAVES, J. July 17, 1878, the insurance company issued a policy to James J. Miller, the plaintiff's husband, to insure for the term of one year in the sum of $650 a two-story framed building situated on leased land and standing on blocks, and not fixed to the freehold. April 27, 1879, the building was destroyed by fire and on the first of June thereafter the assured assigned his claim for the loss to his wife, the plaintiff. The company refused payment and Mrs. Miller brought this action to enforce it. The case was tried by a jury and they found for the defendant corporation.

Among other stipulations in the policy it was provided that it should be void "if the interest of the assured be any other than the entire, unconditional, free and unencumbered ownership of the property and is not so expressed in the written portion of the policy," or "if the premises hereby insured become vacated by the removal of the owner or occupant without immediate or written notice to the company and consent thereto endorsed." Nothing was inserted to qualify the scope or force of the clause concerning title or to show that the interest of the assured was any other than the entire, unconditional, free and unencumbered ownership. At the time of issuing the policy the building was occupied, but it became vacant some five days prior to the fire and so remained until it was destroyed, and no notice was given to the company.

The defence was based on the foregoing stipulations, and if the facts were such as to furnish an answer to the action under either of them no discussion of the other will be necessary. The provision in regard to title stands first and

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is perhaps most important, and no one can fail to observe that it is much more sweeping and exclusive than the generality of such conditions, and the difference is so well marked that many decisions which have been made on stipulations of the same general nature can have no application.

The substantial facts respecting the state of the title at the time of insurance are not controverted. In April, 1876, the building was owned by James J. Miller, the plaintiff's husband and person assured. His nephew, James J. Miller, Jr., had been carrying on business in the building and had received pecuniary assistance through his uncle from the plaintiff. An arrangement was then made by which the plaintiff's husband, James J. Miller, Sr., transferred an undivided half of the building to his nephew, James J. Miller, Jr., and the latter gave to his aunt, the plaintiff, a mortgage on said undivided half to secure her the re-payment of the money she had advanced to him, being $500. The mortgage also covered other property and by its terms $250 were to be paid by the first day of November, 1876, and the remainder by the first day of November, 1877. It has not been foreclosed.

August 14, 1876, Miller, Jr., the nephew, made an assignment for the benefit of his creditors to Charles Newman and the undivided half of the building which he owned and which stood mortgaged to the plaintiff was included. Newman took possession. It hence appears that at this period the plaintiff's husband owned one undivided half of the property, and that the other undivided half was in Newman, the assignee, subject to the encumbrance upon it held by the plaintiff. In this state of things the plaintiff's husband applied for the insurance and the agent refused to entertain the application and gave as a reason, as the plaintiff's husband testifies, that the title "would have to be rectified," and that he would not insure the property "until I got it straightened out." The applicant then went away to get the title "straightened out" and subsequently returned and informed the agent that he had succeeded and the policy

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was issued. The proceedings taken to concentrate and disencumber the title were explained by Miller on the trial in this way: He testified that he called on Newman and "got," as he expressed it, "Newman's right;" and that Newman told him that "it was not worth his while to go on;" that he then had a conversation with his wife, the plaintiff, in which he said to her that it was necessary for him to have her interest in the property to get it insured; and she replied, "All right; you can have it;" and this is substantially the plaintiff's version of the circumstances relied on to show that at the time of the insurance her husband was vested with the "*entire*, unconditional, free and *unencumbered* ownership" of the building.

There was no writing to attest any transfer or surrender on the part of Newman or to show a conveyance from the plaintiff to her husband. But it was not indispensable that there should be. For the purpose of combining in himself the entire free and unencumbered ownership it was necessary that the plaintiff's husband should get in the right and title possessed by Newman and the mortgage interest possessed by the plaintiff, and these results, although capable of being effected without writing, could not be worked out except by transactions containing the elements necessary to make them binding, and here occurs a manifest difficulty. There is a total want of consideration.

If we understand the plaintiff's husband as testifying that Newman gave up the assigned interest to him, then so far as the record discloses there was no consideration to support the arrangement and it had no force. But if Newman abandoned the property to the plaintiff as mortgagee, her interest was not increased and could not be except through purchase on foreclosure and no foreclosure has been had. The legal title must have continued in the assignee. But suppose the meaning was that the property should be applied on the mortgage, (a view hardly possible,) it seems not to have been acted on. It was not applied. There has been no recognition of anything of that kind. But whether another interest was or was not added to that held by the

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plaintiff under her mortgage it was necessary that her husband should be positively vested with whatever interest she had. His description of the transaction relied upon as having legally conferred upon him that interest has been noticed, and we observe that it consisted of mere words. No mention of any consideration was made and the transaction had nothing in it to bind him as vendee or assignee or her as vendor or assignor. It follows that according to the undisputed facts, the entire, unconditional, free, and unencumbered ownership of the building was not in the assured at the time of the insurance and that the policy was therefore not enforceable against the company. The other question becomes immaterial.

The result reached below was correct and the judgment should be affirmed with costs.

The other Justices concurred.

WILLIAM G. SAUNDERS v. THE CITY OF GRAND RAPIDS.

Grand Rapids—City physicians—Vacancies.

The city physicians of Grand Rapids are appointed and not elective officers, and are not authorized by the charter to hold over where their successors are not chosen within a fixed time after their terms expire and a vacancy occurs in the office.

The city council of Grand Rapids is not precluded by the charter from filling an office held by their appointment where there is no one holding it for a regular term.

Error to Superior Court of Grand Rapids. Submitted June 24. Decided June 29.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Harvey Joslin for plaintiff in error. Vacancies should not occur on account of the omission of an appointing power to appoint to office within the time limited by law: Dill. Mun. Corp. 195; *Dow v. Bullock* 13 Gray 136;

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McCall v. Byram Mnfg. Co. 6 Conn. 428; *People v. Fairbury* 51 Ill. 149; *Overseers v. Sears* 22 Pick. 130; *School District v. Atherton* 12 Met. 105; the provision in a city charter that the council *shall* appoint within a limited time is mandatory: *People v. Woodruff* 32 N. Y. 361; *People v. Van Horne* 18 Wend. 518; *Tappan v. Gray* 9 Paige 507; *Pell v. Ulmar* 21 Barb. 500.

Stuart & Sweet for defendant in error.

CAMPBELL, J. Plaintiff was appointed city physician of Grand Rapids in May, 1873. On the 1st of June, 1874, another person was appointed by the council for the ensuing year and entered on the duties and received the salary. Plaintiff, who claims he was ready and offered to perform his duties, sues for his salary for the second year on the ground that the appointment of his successor was void because not made within twenty days after the first Monday of May as required by § 4 of title 2 of the charter. 2 Sess. L. 1871, p. 335.

The charter of Grand Rapids distinguishes very carefully between *elective* officers, who are voted for by the people, and *appointed* officers, who are chosen by ballot by the council. It provides that appointed officers "shall hold their offices for a period of one year from the time of their appointment, unless sooner removed," etc.

By section 23 it is declared that whenever a vacancy occurs in any office the council may fill it; but if elective it shall continue only until the first Monday of the next May, and a new election shall be held at the annual election.

By section 33 an officer "*elected*" shall hold over after his term until his successor is elected or appointed and qualified. There is no such clause concerning appointed officers.

We think it clear that the council can never be precluded from filling an appointed office, when there is no one holding it for a regular term, and that a failure to appoint at the proper time does not give the incumbent any right to hold

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over for a full year, or after his successor has been appointed and qualified. There may be some reason for limiting appointments by the council to offices elective by the people, and yet even in these there seems to be very full power to fill vacancies. It would be anomalous to give the council less power over offices which depend on their own choice than over those which depend on popular votes. And we do not think the charter has left any such consequences to be suffered.

The judgment must be affirmed with costs.

The other Justices concurred.

JAMES ENRIGHT v. WILLIAM HARTSIG.

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Demurrer—Injury by overflow—Estimate of damage—Obstructing ditches.

A demurrer on technical grounds does not affect the sufficiency of a declaration in matters of substance.

A declaration in case before a justice for overflowing defendant's land, sufficiently sets forth the cause of action in alleging that defendant dammed or caused to be dammed a ditch which plaintiff had used as a matter of right for more than twenty years and was situated on a road laid out by the commissioners of highways, and that by the obstruction of the ditch the plaintiff had suffered damage as specified.

The opinions and estimates of eye witnesses acquainted with the premises and the surroundings are admissible to show the extent of damage done by overflowing land.

A man was sued for overflowing plaintiff's land by obstructing a ditch. His wife and child were the persons who filled it up, but when the plaintiff cut trenches to let off the water, defendant himself filled them up again, threatened those who were sent to re-open them and asserted his purpose not to let the main ditch be cleared for less than $1500; there was some evidence also that he knew where his wife was when she was at work. *Held*, that the jury were justified in finding him responsible for the mischief.

Error to Macomb. Submitted June 28. Decided June 29.

CASE. Defendant brings error. Affirmed.

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Hawley & Firnane for plaintiff in error. The objection that a declaration does not set forth a legal cause of action is not waived by pleading to the merits: *Stoflet v. Marker* 34 Mich 313; alternative pleading is bad for uncertainty, which is an objection of substance: Steph. Pl. (9th Am. ed.) 388; 1 Chitty Pl. (14th Am. ed.) 236; opinions as to damage done to land are inadmissible: *C lark v. Field* 42 Mich. 342; *Prosser v. Wapello County* 18 Ia. 327; *Blair v. Mil. etc. R. R. Co.* 20 Wis. 262; *Mitchell v. Allison* 29 Ind. 44; *Howell v. Medler* 41 Mich. 641.

Crocker & Hutchins for defendant in error. A declaration that is defective in form should be demurred to unless defendant waives the defect: *Van Middlesworth v. Van Middlesworth* 32 Mich. 183; *Huntress v. Burbank* 111 Mass. 213; *Shawmut Ins. Co. v. Stevens* 9 Allen 332; *Upham v. Damon* 12 Allen 98; a ditch that has been in use as a neighborhood drain is subject to the same rules as other water courses: *Freeman v. Weeks* 45 Mich. 335.

CAMPBELL, J. Hartsig obtained judgment against Enright before a justice of the peace in Macomb county for overflowing his lands by stopping up a ditch that had been dug many years before by plaintiff and previous owners of the adjacent lands by common consent, and used ever since. The case was appealed to the circuit court where he prevailed again. It is now brought up on error.

An objection is made to the declaration as not full enough.* We think it contains every substantial allegation

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*IN JUSTICE'S COURT.

WILLIAM HARTSIG vs. JAMES ENRIGHT. } *Before John Hartman, justice of the peace in and for the county of Macomb.*

County of Macomb, ss. William Hartsig, plaintiff, complains of James Enright, the defendant herein, in a plea of trespass on the case. For that whereas the defendant on to wit, the 14th day of July, at the township of Warren, and county aforesaid, dammed up, or caused to be dammed up and stopped a certain ditch upon a road or way situate and being on the southwest quarter of section ten, township of Warren, county of Macomb. Said road or way was laid out by the commissioners of highway of the township of Warren, they causing the same to be

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necessary to show the plaintiff's cause of action, and that the objection has no force. If demurred to it could only have been on technical grounds, which would not affect its sufficiency in matters of substance.

The testimony concerning the amount of damage was largely matter of opinion, and could only be got at by the good judgment of those acquainted with the premises and surroundings. In actions for damage to crops and similar injuries such opinions, based on sufficient facts, are always admitted, and there was no error, after the witnesses had shown the extent of mischief and their examinations of the premises, in receiving their several estimates. It is difficult to see how else any light could be given to the jury on matters not capable of such a description as would enable them to tell anything about the losses of plaintiff without such opinions. None but eye-witnesses could have made any safe estimate.

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surveyed, recorded or filed in the office of the clerk of said township of Warren, more than twenty years before the commencement of this suit, as a reference to the survey and books of the clerk will more fully appear to this court, and are evidence thereof. Said road is open or opens on the center line road, or highway; thence running east by or adjoining lands now occupied by the plaintiff upon the south and northeast, and on the north by lands occupied by the defendant, in section ten, in both instances for farming purposes. On said road a ditch was dug, part of the way on the south side of said road, thence crossing said road to the north side, and emptying into center line road ditch. The lands on this road, adjoining where said ditch is located, are flat, low lands. Said ditch was made more than twenty years before the commencement of this suit, to take the surface water off from the lands of the plaintiff, and has been in use for that purpose more than twenty years last past. Said road and ditch are a necessity to the plaintiff; without the road the plaintiff cannot get to the lands east and north of said road, and without the ditch he cannot till and crop said lands. Yet the said defendant, well knowing the facts in the premises, has wrongfully and unjustly dammed, or caused to be dammed or stopped, said ditch upon said road, or way; and by so damming, or procuring the same to be dammed to be done, said surface water has flooded the land of the plaintiff on the south and northeast of said road, to the great injury, loss and damage of wheat and grass, and increase of work and labor to crop the same.

Damage of wheat, thirty dollars.

Damage of grass, forty dollars.

Damage of work and labor, fifteen dollars.

And whereas at the time of the commencement of this suit and before, plaintiff had the right and did use said right to the road and ditch more than twenty years before the commencement of this suit; and others

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It is lastly insisted that the case should have been taken from the jury for want of evidence that defendant had any hand in the mischief. It appears that his wife and young son were the persons seen in the act of filling up the ditch. But it appears that when plaintiff opened small trenches to let off the water into the main ditch below the obstructions, defendant not only filled them up again, but threatened the persons who were sent to re-open them. It also appears that he asserted his purpose not to allow the main ditch to be cleared out for less than $1500.

We think there was enough to go to the jury on the question whether his wife and child were acting independently. The rules of law protecting the confidences of husband and wife make it difficult to determine such questions as arose here except by circumstances. There was some evidence that he knew where she was when she was at work. There was evidence that he approved the work and was unwilling to have it undone. There was evidence that he actively

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used and enjoyed said right and use of said road and ditch, even before said plaintiff.

And whereas, also, the said defendant gives out and insists before and since the commencement of this suit, that the plaintiff shall not take or run water along said road in said ditch above set forth, he, the said defendant, well knowing that the plaintiff has no other way to get said surface water from said lands, also well knowing that the plaintiff cannot get to and from said lands only by and upon said road; also, well knowing that without the use of said ditch the plaintiff cannot crop said lands; the defendant well knowing all the facts and circumstances in the premises, yet the said defendant interrupts the plaintiff in the use of said road and ditch aforesaid, to the great annoyance of the plaintiff, and in the loss, injury, destruction of wheat and grass, rotting and spoiling upon said lands, through the flowing of said lands by the outrageous conduct of the defendant in interrupting a personal right and use of both road and ditch which was enjoyed by the plaintiff and by others before the plaintiff, and also, before said defendant came into the township of Warren, or the county of Macomb. Yet the said defendant, well knowing the premises, has wantonly and without cause or provocation of any kind repeatedly and at divers times, both before and since the commencement of this suit (and it must be out of ill-will) injured, obstructed and otherwise interfered with the personal rights of the plaintiff. Wherefore the plaintiff saith that he is injured and hath sustained damage to the amount of one hundred dollars or under, and therefore he brings suit.

WILLIAM HARTSIG, Plaintiff.

Dated at Warren this 21st day of July, A. D., 1880.

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prevented plaintiff from draining into the same ditch by filling up his trenches. We think the jury had testimony which entirely justified their finding.

The judgment must be affirmed with costs.

The other Justices concurred.

MUTUAL BENEFIT ASSOCIATION OF MICHIGAN v. ENOS HOYT.

Insurance of stranger—Defence based on public policy.

An insurance policy issued for the benefit of a person who is neither an heir nor a relation of the assured, and whose interest is not promoted by the latter's continuing alive is in the nature of a wager policy, and void as against the public interests.

A party to a contract deliberately made without fraud or deceit is in no position to defend against it on grounds of public policy, but the defence is allowed in the public interest.

Error to Wayne. Submitted June 28. Decided July 1.

ASSUMPSIT. Defendant brings error. Reversed.

Conely & Lucking for plaintiff in error. A policy of insurance on the life of another is void as against public policy when it is a mere basis for speculation in the interest of the beneficiary: *Gilbert v. Sykes* 16 East 157; *Evans v. Jones* 3 H. & C. 77; *Hartley v. Rice* 10 East 22; *O'Hara v. Carpenter* 23 Mich. 410.

Atkinson & Atkinson for defendant in error.

MARSTON, C. J. The plaintiff in error is organized under chapter 94 of the Compiled Laws. The act authorizes any number of persons not less than five to organize as a corporation, for the purpose of securing "to the family or heirs of any member upon his death" a certain sum of money, to be paid out of the corporate funds or by an assessment upon the members in the class to which the deceased belonged. The principal facts in this case are, that Isaiah Phair, on the 22d day of November, 1879, made a written application, upon

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one of the blank forms of the association, for a five thousand dollar certificate, to be made payable to Enos Hoyt. In this application Phair was asked to state "relation of the beneficiary (Hoyt) to the applicant" and the answer given thereto was "No relation." The proper medical report was made, money premium paid, and a certificate issued on the 25th day of November, a copy of which is given in a note herewith.*

Phair died March 4, 1880, and at the time of his death there were but 1135 members of the association in the class in which he was insured. The association declined to pay upon several grounds, the most important, and the only one we shall consider, being that Hoyt was not a member of Phair's family or one of his heirs. As showing the relations existing between Phair and Hoyt, the testimony of the latter is given in full herewith.†

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*THE MUTUAL BENEFIT ASSOCIATION OF MICHIGAN—CERTIFICATE NO. 4051—AGE AT ISSUE, 33-7-8—AMOUNT OF CERTIFICATE, $5000.

In consideration of the application for this certificate, which is hereby referred to and made part of this contract and of each of the statements made therein, and in further consideration of the first payment (four dollars), receipt whereof is hereby acknowledged, and of the further payment of the semi-annual dues of one dollar, on or before the first days of July and January of each year, and upon the notice of any assessment and the prompt payment of the same (said assessment never to exceed one dollar and ten cents) during the continuance of this contract, does promise to pay to Enos Hoyt, friend of Isaiah Phair, of Jackson, in the State of Michigan, his executors, administrators or assigns, the sum of five thousand dollars within ten days after due notice and proof of the death of Isaiah Phair; *provided*, there be five thousand members of the association in good standing. In case the number of members of the association shall be less, then a sum of as many dollars as there shall be members at the death of Isaiah Phair. If the above-named dues or assessments are not paid as provided for in the articles of incorporation and by-laws of the association, then this certificate shall be inoperative and void. In witness whereof, the Mutual Benefit Association has caused this certificate to be signed by its president and secretary at its office in the city of Detroit, this 25th day of November, 1879.

J. W. MCGRATH, Secretary. GEO. C. LANGDON, President.

†I am the plaintiff in this case. Phair first came to board with me in December, 1878, and stayed till April 25, 1879. He returned on September 7, 1879. He came back as a boarder, and stayed as such boarder till December 25th.

Question. State whether there was any arrangement or agreement between you and Mr. Phair as to his becoming a member of the family and remaining in the family during his life-time?

Objected to by defendant as incompetent and immaterial; also incompetent to contradict the statement of no relationship set out in the application; also because the certificate purports to insure a friend, and it cannot be shown that the family relationship existed; also as irrelevant to the issue. Objection overruled. Exceptions for defendant.

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This case seems to be peculiar, and if not one of fraud, then from the very inception, it would appear at least to be delusive and deceptive. While the insurance, if such it may be called, was for five thousand dollars, and the premium paid was for this sum, yet the actual amount was fixed by

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A. He was to live with me as long as he lived. As long as I had a home he was to have one with me; after that he was treated as a member of the family. This arrangement was made about the time the policy was got out. I was keeping hotel at that time. Q. What, if anything, did he do around the hotel after this arrangement? A. He was not obliged to do anything. He used to do chores. Q. Seemed to take an interest in it and work around as the rest of you? A. Just about the same. Q. Whether during that time and after this arrangement and up to his death he worked at your house around doing chores as your wife would call on him? A. Yes, sir. Q. And between the two places lived with you as a member of your family? A. Yes, sir; just the same. Q. And under an agreement with you to that effect? A. Yes, sir. Q. You say he came and went, and in all respects conducted himself toward you, and you treated him, as one of the family? A. Just about the same, sir. He went away in December to Eaton Rapids and came back the latter part of January. When he came back I needed a man, so I told him if he wanted to, I would give him $10 a month, the same as I would have to pay another man, so he stayed there as night watch until he got so sick he could not work. Q. So that from the time he came back, in addition to treating him as a member of the family, you allowed him $10 a month for some work he did? A. Yes, sir. Q. Who took care of him? A. Some of the help in the house. Q. Under whose instructions? A. Mine. Q. Who paid the bills? A. I did. Q. Who called in the doctor? A. I did. Q. Who paid them? A. I did. Q. Who paid the expenses of burying him? A. I did. Q. State whether Phair was indebted to you at the time of the issuing of the policy.

Objected to for the same reasons as like testimony of the witness Foster. Objection overruled. Exception for defendant.

A. Yes. He was owing me about $200; don't know exactly how much. Q. And if you had charged up for all you did for him after he became a member of the family, how much would he have owed you at the time of his death? A. About $600.

Cross-examination. Phair was not in any business when he first came to my place. Did not know where he came from. He was to pay me $5 per week. He never paid me anything. He did not do anything; had no employment. I kept my account with my boarders in a large book; charged them with board and gave credit for payments. Q. Why didn't you charge Phair with his board? A. I did have him charged with his board until after he was insured. After he was insured I gave him his account. He was square. I gave him his bill. Q. You say you gave him a square account after the insurance? A. I gave him his bill. Yes, sir. It was just stated in the book Ike commenced to board such a date, so much per week. I tore the leaf out, and gave it to him. Q. He never paid you anything? A. No, sir. Q. Any others around you had boarding like that? A. I had one—George Proudfit. I did not know where Phair went after he left April 5, 1879. Didn't keep any track of him. Never dunned him for my pay while he was gone. No arrangement was made when he came back in September, '79; just came and stopped. Q. You had at the Sheridan House Mr. White (bar-tender) and this man (Phair) working around? A. No, sir. I did not have this

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the number of members in the class to which the assured belonged, which turned out to be but a little over eleven hundred, so that the amount to be recovered was thus cut down.

Again, the application, signed by Phair, and delivered to the company, and upon which the certificate was issued,

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man working around the Sheridan House. He was there, but not working for me. I moved from the American to the Sheridan May, '79, and from there to the Central City House, December, '79. When he was staying with me from December, '78, to April, '79, I did not charge up his board in the books. Q. You charged the other boarders? A. No, sir. I didn't have any regular boarders. Q. Why did you keep him? A. He had been so long with me. Q. From December to April, between three and four months, do you call that a long time? A. Wouldn't you call it a long time if you had a man boarding with you and he did not pay? Q. So you kept him along because he had not paid you? A. I kept him along so as to get my pay. When he left me at Christmas time, after the insurance, he went to Eaton Rapids in a livery barn. He earned wages but did not pay them to me. Q. This was after he became a member of your family, wasn't it, according to your statement? A. Yes, sir. Q. When was it you tore his account out of the book and gave it to him? A. When I got the policy there; before he went to Eaton Rapids. He used to do a chore around once in a while. I have him charged with $33 for clothing—some clothes of mine had at different times. I made no charge of anything till this suit was commenced. Q. When you gave it to him you intended it as a gift, did you? A. Yes, sir. At any time when he worked for me before he came back from Eaton Rapids, I paid him five and ten cents a chore. Q. You have charged him in this memorandum with $5 a day for taking care of him the last ten days of his life. He was only confined to his room about four days before his death, was he not? A. That is all. Q. Was it worth $5 per day for the last ten days of his life? A. Yes, sir. Worth that to have him around. Q. Why didn't you send him to the hospital or pest-house? A. Because I had an insurance on him, and was to take care of him as long as he lived. Q. How old was he? A. Thirty-one, or 32, or 33, I think. Q. You stated a minute ago, didn't you, that at that time he was an able-bodied man? A. Yes, sir. Q. And you were going to take care of him all the remainder of his life for the insurance? A. I was to give him a home. Q. Was that the agreement? A. The agreement was that he was to have a home as long as I had it. He could go out and work as he had a mind to, and he could come home as he had a mind to. Q. So that, for the remainder of his life, 30 or 40 years, if it might be so long, you were to give him a home at any time? A. We did not expect this man was going to live there all his life at that time. If he wanted to go to work he could. Q. But he need not do it? A. No, sir. Q. So you agreed to board him for that insurance? A. I agreed to let him have a home. Q. Who paid for this insurance? A. I did. Q. So that for the insurance you were not only to give him a home, but you were to pay for the insurance itself? A. That was what I was to do. I don't think I swore anything before the coroner about Phair's being indebted to me. I don't recollect that the question was asked me. I understand the cause of Phair's death was congestion of the lungs. Q. What did you swear before the coroner's inquest was the cause as you understood it? A. Whisky, I think. Q. Why did you swear whisky at that time? A. From the very fact I heard the doctors talking. Q. You

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showed clearly, and without any ambiguity or uncertainty, that the certificate to be issued was to be made payable to Hoyt who was no relation to the applicant. The certificate issued three days after the date of the application, referred to the application and made it and each of the statements

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knew he was a drinking man, didn't you? A. Yes, sir. I knew he was a drinking man. I did swear before the coroner that he had free access to the bar. That meant my bar. Yes; that was true. He did have free access. Q. And from all you knew he was a drinking man at the time he was insured? A. Yes, sir. There ain't many men insured who are not drinking men. Show me one, and I will show you a white blackbird. I did swear before the coroner's jury that I paid him $10 a month and board. Q. Why did you swear to that if he was a member of your family? A. I did. Q. What for? A. For being night-watch. Q. Did you swear before the coroner that he owed you anything? A. I don't recollect the question was asked me. Q. Did you swear he was a member of your family? A. I don't think the question was asked me. Q. They asked you how he was living there, and you said you were paying him $10 a month and board. You did not say he was a member of your family? A. The question was not asked me. I have been convicted several times of keeping a disorderly house. I paid all the fines I have ever been fined. Yes, sir. I was convicted once in the circuit court of keeping a house of ill-fame. Q. Did you swear before the coroner that Phair worked for you on and off for a year? A. I did. I meant that he had done chores for me on and off for a year. I paid him five or ten cents for what chores he did. Q. Do you mean to say that if he was owing you all this money, that nevertheless whenever he did a little work you paid him for it? A. Yes, sir.

Minutes of evidence of witness before coroner's jury here read as follows:

Deceased has worked for me about two months; has worked off and on for about a year. He acted as night watch. Understood his complaint was whisky. He was a man who drank pretty freely. I gave him $10 a month and board. Do not know of his having a family; understand he has a brother. I also have George Proudfit insured in my favor. Mr. Hoar found Phair dead this morning. He was filling Phair's place while he was indisposed. Phair had free access to the bar. Think he drank some outside of my place. I knew he was drinking when I had him insured. Captain Proudfit had his life insurance in my favor, and I mine in his. But when it came to paying for the policy he could not pay for mine, but I have kept his up. It was talking about this in Phair's presence the way I happened to get his policy. Q. Now, Dr. Crawford swore, Mr. Hoyt, that he attended Phair some time before the insurance, and that you paid him. Is that correct? A. Think I paid him 75 cents then. I was thinking that was at the American House; that is my impression. I don't remember any other time. I don't recollect how long this was before we moved from the American to the Sheridan; but I recollect paying him 75 cents. Q. Then you were not only allowing him his board without getting any money, but you were paying his doctor's bills? A. I paid 75 cents. I don't know what was the matter with Phair for which the doctor prescribed. Phair was not a man of any property that I know of. Some of the clothes were furnished before the insurance. Q. So that you were not only boarding him, but giving him clothes before? A. Yes, sir; a little.

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therein a part of the contract, and the promise made in the certificate was "to pay to Enos Hoyt, *friend of Isaiah Phair*, of Jackson * * the sum of five thousand dollars."

It is thus clearly apparent that the association in accepting the application, receiving the premium, and issuing the certificate, well knew that Hoyt was not a relative, and was not claimed to be a member of Phair's family or an heir, within even the most liberal construction. So that the association issued this certificate under circumstances which most strongly call upon the courts to enforce performance of their agreement, if certain imperative rules of public policy do not forbid.

The defence set up in this case must be considered as that of the public and not that of the defendant, as it stands in no position to interpose such a defence. *Lyon v. Waldo* 36 Mich. 353.

We need not discuss the other facts at length. The testimony of Hoyt shows that this contract was in the nature of a mere wager policy, and that his interest could not be promoted by prolonging the life of Phair. Such contracts are so clearly contrary to public policy that they cannot be upheld, and must be declared absolutely void.

The judgment in this case must be reversed with costs of both courts.

The other Justices concurred.

CITY OF WYANDOTTE v. JEREMIAH DRENNAN.

Acceptance of office—Changes in salaries.

Acceptance of a salaried public office does not establish contract relations between the officer and the public whereby the latter are bound to continue to pay the same salary as was paid at the time of the appointment to office.

The Legislature has ample power to fix the salaries of public officers, and, unless restrained by the Constitution, to change them at any time, even during the official term, and it can delegate this power to municipal councils.

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Error to Wayne. Submitted June 28. Decided July 1.

Assumpsit. Defendant brings error. Reversed.

George W. Coomer for plaintiff in error.

Charles E. Miller and *Clarke & Kellogg* for defendant in error. The appointment of a municipal officer for a definite time, and his acceptance, constitute a contract: *Chase v. Lowell* 7 Gray 33; *Kimball v. Salem* 111 Mass. 89; *Caverly v. Lowell* 1 Allen 289; but see Dill. Mun. Corp. (2d ed.) § 168; *Com. v. Bacon* 8 S. &. R. 135; *Barker v. Pittsburgh* 4 Penn. St. 49; *Augusta v. Sweeney* 44 Ga. 465; *Iowa City v. Foster* 10 Ia. 189; and the salary cannot be reduced against the assent of the officer without a breach of contract obligation: *University of Alabama v. Walden* 15 Ala. 655; *Murdock v. Academy* 12 Pick. 244; *Dutch Church v. Bradford* 8 Cow. 457; *Avery v. Tyringham* 3 Mass. 160.

Cooley, J. The defendant in error was recorder of the city of Wyandotte during the years 1877 and 1878. He claims that he has never been paid in full his salary for those years, and as the common council refused to allow and pay him what he demanded, he brought suit in *assumpsit* to recover.

By the city charter the recorder is elected for a term of two years. Laws 1867 vol. 2 p. 188. He is *ex officio* a justice of the peace for the city, with the usual powers and authority of justices; he is clerk of the common council, and is required to keep a record of their proceedings and an account of their receipts and expenditures, and to perform for the city all such duties as township clerks are required by law to perform for the several townships. Ibid. 206. He is also to possess the same powers and perform and discharge the municipal duties of mayor during the absence or inability, death, resignation or removal of the mayor. Ibid. 207. For his compensation he is entitled to receive "such sums as the common council may allow, not exceeding three hundred dollars per annum." Local Acts 1875 p. 680.

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The facts in the case are stipulated, and the stipulation states that at the time of the election of defendant in error the salary of the office of recorder was two hundred and fifty dollars per annum; by which we understand that there was a standing resolution or order of the common council for the payment of compensation at that rate. This sum was paid to him for 1877, but for the next year the common council by resolution reduced the compensation to one hundred and fifty dollars, and that sum was received under protest. This suit is brought to recover the difference between that sum and the sum as previously fixed.

The charter expressly gives to the recorder the customary town clerk's fees for the duties performed by him which in towns are performed by clerks. Laws 1867 vol. 2 p. 206. He is also as justice of the peace entitled to charge and collect such fees as are chargeable and collectible by other justices. The annual compensation is therefore provided for such services performed by him for the city as fees are not given for. It is evident from the foregoing statement of his duties that these services must vary from time to time considerably, and there is wisdom, therefore, in leaving the compensation to be fixed by the council from a consideration of what these may have been or are likely to be in any particular year.

It is claimed, however, that when the salary is fixed at the time when the office is accepted, the acceptance is presumed to have the salary in view, and a contract is thereby effected between the officer and the city which neither can change without the consent of the other. This is a position that has frequently been taken and almost as often overruled. Nothing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public. The leading case of *Butler v. Pennsylvania* 10 How. 402, has been universally regarded as having settled that question; and it has been followed by decisions in numerous cases.* The salary or other compensation is there-

*NOTE.—See a large number collected in Cooley's Const. Lim. 4th ed. p. 336 note. See also the recent case of *State v. Kalb* 50 Wis. 178.

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fore at the discretion of the legislative authority of the State, or of such other authority as the Legislature has seen fit to entrust it to. This was indirectly recognized in *Chapoton v. Detroit* 38 Mich. 636; a case which is in point here.

It is said on behalf of the defendant in error that the principle above stated rests on the right of the officer to resign and give up his office at any time; and it is further said this right did not exist in the case of this officer because he could only resign to the common council—the very body that reduced the salary—and the council might keep him in by refusing to accept his resignation. Whether the council could in this way compel the recorder to continue in the performance of his duties we do not care to consider in this case, because we think the legislative authority over the subject does not depend upon the existence or non-existence of any such power. Offices are created for the public good at the will of the legislative power, with such powers, privileges and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But except as it may be restrained by the Constitution the Legislature has the same inherent authority to modify or abolish that it has to create; and it will exercise it with the like considerations in view. Whoever accepts a public office must accept it with this principle of constitutional law in view; and if his compensation is reduced below what seems to him reasonable, it may be a hardship, but it is not a legal wrong. The legislative power is ample, and he is supposed to know when he takes the office that it is liable to be exercised.

The legislative power to determine the compensation in respect to this office has been delegated to the common council, and that body has exercised it. This is conclusive.

The judgment must be reversed, with costs of both courts.

The other Justices concurred.

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THE EMPIRE MANUFACTURING COMPANY OF GRAND RAPIDS v. WILLIAM J. STUART.

Liability on paper issued in a corporate name—Handwriting.

A company supposing itself to be incorporated issued paper in its corporate name, but afterwards finding that it was not properly organized, dissolved and was legally incorporated under a different name. *Held* that it could not repudiate its paper.

The dissolution of a company not regularly incorporated, but supposing itself to be so, does not prevent creditors from looking to the old organization for payment.

The testimony of one who swears that he knows another's handwriting either from having seen him make his signature, or from business correspondence apparently signed by him, is competent in proving the latter's indorsement.

Error to Kent. Submitted June 28. Decided July 1.

ASSUMPSIT. Defendant brings error. Affirmed.

Eugene Carpenter for plaintiff in error. The contract of a private corporation cannot make it perpetual contrary to public policy and the object of its charter: *Mumma v. Potomac Company* 8 Pet. 287; nor can a judgment be rendered or revived against a defunct corporation: *Bonaffe v. Fowler* 7 Paige 576; Thompson's Liability of Stockholders § 3; *Greeley v. Smith* 3 Story 657; *Merrill v. Suffolk Bank* 31 Me. 57; an act of user will not estop a corporation *de facto*, nor its stockholders, from denying corporate existence: *Hudson v. Carman* 41 Me. 84; *Unity Ins. Co. v. Cram* 43 N. H. 636; *Utley v. Union Tool Co.* 11 Gray 139; *Gardner v. Post* 43 Penn. St. 19; *Harriman v. Southam* 16 Ind. 190; *Jones v. Cincinnati Type Co.* 14 Ind. 89; *Heaston v. Cincinnati R. R.* 16 Ind. 275; a witness to handwriting cannot compare the disputed signature with that on any document not in the case and relevant to the issue: 2 Phil. Ev. (C. & H. notes) 615, n. 2, 483; Roscoe's Crim. Ev. 163; 2 Stark. Ev. (6th Am. ed.) 374, n. *h.*; Peake's Ev. (5th ed.) 155; *Doe v. Newton* 5 Ad. & El. 514; 1 Greenl. Ev. § 578; *Vinton v. Peck* 14 Mich. 287; *Van Sickle v. People* 29 Mich. 61; *Foster's Will* 34 Mich. 21; *State v.*

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Ward 39 Vt. 225; *Richardson v. Newcomb* 21 Pick. 315; *Chandler v. LeBarron* 45 Me. 536; *Lyon v. Lyman* 9 Conn. 55; *Adams v. Field* 21 Vt. 256; *Myers v. Toscin* 3 N. H. 47; *Bowman v. Sanborn* 25 N. H. 97; *Guffey v. Deeds* 29 Penn. St. 378; *Travis v. Brown* 43 Penn. St. 17; *Robertson v. Miller* 1 McMul. 120; *Baker v. Mygatt* 14 Ia. 131; in some States such papers are admissible only where there is other proof of handwriting: *State v. Carr* 5 N. H. 367; *Boman v. Plunkett* 2 McC. 518; *Duncan v. Beard* 2 Nott & McC. 401; or when they are conceded to be genuine: *McCorkle v. Binns* 5 Binn. 340; *Lancaster v. Whitehill* 10 S. & R. 110; a paper cannot be shown to be an original merely by the opinion of a witness: *Com. v. Eastman* 1 Cush. 217; *Martin v. Maguire* 7 Gray 177; *Bacon v. Williams* 13 Gray 525; the witness must have seen the person write or know his acknowledged signature: *Brigham v. Peters* 1 Gray 145.

Stuart & Sweet for defendant in error. A corporation can be dissolved only by the concurrence of the parties or by a judgment: *Town v. Bank of River Raisin* 2 Doug. (Mich.) 538; *Kincaid v. Dwinelle* 59 N. Y. 548; *Lake Ontario Nat. Bank v. Onondaga County Bank* 7 Hun 549; *Portland Dry Dock Co. v. Portland* 12 B. Mon. 77.

MARSTON, C. J. The plaintiff in error was sued upon a promissory note given by it in its corporate name. The principal defence relied upon was that the company, by mistake, was not, at the time of giving the note, properly organized under any law of this State; that afterwards, upon ascertaining this fact, the corporation was dissolved and a new corporation formed under a different name. This corporation was one that could have been legally organized under laws existing at the time of its formation. The business for which it was organized, that of manufacturing, was one authorized, and having attempted to organize in good faith, and having, in the course of its business, given negotiable paper in its corporate name, it could not afterwards repudiate the transaction or evade responsibility when sued

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thereon, by setting up its own mistake, affecting its original organization. *Merchants' etc., Bank v. Stone* 38 Mich. 779.

The dissolution would not deprive the creditors of still following and looking to the old organization for payment. Our statute allows three years after dissolution, for certain purposes, in winding up the affairs. 1 Comp. Laws § 3435.

The execution of the note sued upon was not denied at the time of joining issue, but it was still insisted that this did not admit or dispense with proof of the endorsements thereon. Proof of the endorsements was given and the only question relates to the sufficiency of the same. The evidence introduced was competent for such purpose.* A more

*And the attorney for the plaintiff then called Abram S. Hall, as a witness for the said plaintiff, who being sworn on the part of the plaintiff, testified as follows, the stenographer being present and reporting the case:

(Examined by Mr. Sweet.)

Q. Mr. Hall, look at that note (handing witness note) and state to the court, whether you have computed the amount of interest upon it?

A. I have.

Q. What is the amount?

A. The amount of interest is $5.89.

Q. The principal is $167.86? A. Yes, sir.

Q. This is figured from what time, the maturity of the note, or the date of it?

A. From the maturity of the note. It was drawn up for three months. It was figured at 7 per cent.

(Note read.)

Q. Mr. Hall, are you acquainted with the handwriting of Henry H. Dennis, of the Farmers' and Mechanics' Bank, by correspondence or seeing his writing? A. I am to some extent.

Q. Do you know what position he has as an officer of the bank?

A. Assistant cashier.

Q. What bank? A. The Farmers' Mechanics' Bank.

Q. Look at that endorsement and state whether in your opinion it is his endorsement?

Objected to on the ground that the witness is not proved to be an expert.

The Court:—I suppose the witness can state whether or not he knows the handwriting of Dennis.

The Witness:—Yes, sir; I do.

Q. State whether the endorsement is by him?

A. Yes, sir; it looks just like his writing.

Q. In your opinion it is his writing? A. Yes, sir.

Q. State whether from correspondence and papers you are acquainted with the handwriting of J. S. & M. Peckham?

A. I have seen letters that came from their office.

Q. You have had correspondence with them so you would know their signature? A. Yes, sir; I do.

Objected to as incompetent; objection everruled; exception taken.

Q. State whether that is their endorsement?

A. I think it is in their handwriting.

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stringent rule is not required for the protection of the defendant.

As we discover no error in the record the judgment must be affirmed with costs.

The other Justices concurred.

STEPHEN L. TUTTLE v. T. STEWART WHITE ET AL.

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Damages for conversion of logs—Title to personalty.

The measure of damages in trover for the conversion of logs purchased in good faith from willful trespassers who have put them afloat, is their value when first taken under defendant's control.

The purchaser of personalty runs the risk of the title, and if he buys from one who cannot give title he must suffer the loss and look to his vendor.

Error to Kent. Submitted June 29. Decided July 1.

TROVER. Plaintiff brings error. Reversed.

C. G. & W. W. Hyde for plaintiff in error. Purchasers in good faith but from a trespasser are liable in trover for the value of the goods where sold: *Nesbitt v. St. Paul Lumber Co.* 21 Minn. 491; *Final v. Backus* 18 Mich. 218; *Grant v. Smith* 26 Mich. 201; plaintiff can always recover the value of the goods when first taken: *Symes v. Oliver* 13 Mich. 9; *Ripley v. Davis* 15 Mich. 75; but where logs are converted, the measure of damages in Wisconsin is the highest market value before trial: *Webster v. Moe* 35 Wis. 75.

J. C. Fitzgerald for defendant in error. Trover for cutting and carrying away timber lies only where the possession and title is not held adversely: 1 Chitt. Pl. 167; *Mather v. Trinity Church* 3 S. & R. 509: and where the owner follows the timber into the hands of innocent parties, he waives his claim for more than the actual damages

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which was their value at the time and place of conversion: *Railway Co. v. Hutchins* 32 Ohio St. 584; *Allison v. Chandler* 11 Mich. 542; *Warren v. Cole* 15 Mich. 265; *Daily Post Co. v. McArthur* 16 Mich. 447; *Justice v. Mendell* 14 B. Mon. 12; *Forsyth v. Wells* 41 Penn. St. 291; *Hill v. Canfield* 56 Penn. St. 454; *Wood v. Morewood* 3 Ad. & El. (N. S.) 440; *Reid v. Fairbanks* 4 J. Scott 729; *Weymouth v. Chic. & N. W. Ry.* 17 Wis. 550; *Moody v. Whitney* 38 Me. 174; *Hyde v. Cookson* 21 Barb. 92; *Baker v. Drake* 53 N. Y. 211; *Heard v. James* 49 Miss. 236; *Riddle v. Driver* 12 Ala. 590; *Dresser Mnfg. Co. v. Waterston* 3 Met. 9; *Baldwin v. Porter* 12 Conn. 484; *Wetherbee v. Green* 22 Mich. 314; *Ege v. Kille* 84 Penn. St. 339; *United Merthyr Collieries Co.* L. R. 15 Eq. Cas. 46: 5 Eng. 707; *McLean County Coal Co. v. Long* 81 Ill. 359; *Herdic v. Young* 55 Penn. St. 176.

MARSTON, C. J. The action in this case was trover. The defendants purchased the logs in question from Sheridan & Hamilton, who cut them upon plaintiff's lands, and who were unquestionably trespassers in so doing. They, Sheridan & Hamilton, made no claim or pretence of having cut the logs under circumstances tending even to show good faith on their part. Sheridan & Hamilton sold the logs to defendants, afloat in Black creek. It was claimed, and we shall so assume, that defendants in making the purchase acted in entire good faith; they afterwards run the logs into Flat river and there sold them at an advanced price. The material question relates to the rule laid down as to the proper measure of damages. The court charged the jury in substance, that if the defendants in purchasing these logs acted in good faith, the rule would be either the value of the logs where they were cut on the ground, with the addition of any profit there might be in handling them and bringing them to Flat river, or the value at Flat River deducting the cost of bringing them there.

We are of opinion that the facts in this case did not warrant the charge as thus given These defendants purchased from

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trespassers, and if they acted in good faith in so doing, all they could ask would be protection in what they should expend in money or labor thereon thereafter. A person however in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser or one who has no title and can give none, he must suffer the loss or look to his vendor. To hold otherwise would be to give the trespassers the benefit of their own wrong, contrary to all the authorities. If these defendants had only made a partial payment for the logs under their contract of purchase, and the plaintiff herein was limited in his recovery to the value of the logs when first severed from the land, then defendants would be the gainers; they would have the benefit of the trespasser's labor, and yet the latter could not maintain an action to recover the amount thereof, or the balance of the contract price. The conversion by these defendants took place when they first took charge or control over these logs in Black creek, and they should respond in damages according to the value at that time. The same reasons do not exist in this case to protect these defendants that did in *Winchester v. Craig* 33 Mich. 210, and *Wetherbee v. Geeen* 22 Mich. 311.

There are very many cases where the value of the timber standing, or when first severed from the soil, would be but nominal, and to give willful trespassers, or those to whom they may sell, the benefit of any increased value put upon it by the original wrong-doer, and confine the owner to the nominal value, would but encourage the commission of acts of trespass, and tend to make purchasers at least careless as to the title they were acquiring. It is easy for any one to claim that he has purchased property in entire good faith, and very difficult in many cases to establish the contrary, and if one claiming to be such, is protected to the extent of the increased value he may have in good faith added to the property, this is all he can fairly claim under the law. This rule in effect was held in *Isle Royale Mining Co. v. Hertin* 37 Mich. 332, and much that was there said is equally applicable in the present case. We have not

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overlooked the case relied upon, among others cited, of *Railway Co. v. Hutchins* 32 Ohio St. 584. We have heretofore had occasion to examine the many cases there cited, and they do not lead us to any conclusion other than the one here arrived at.

We are of opinion that the judgment should be reversed with costs and a new trial ordered.

The other Justices concurred.

William Hicks v. Daniel C. Lyle.

Trover lies for conversion of chattel notes.

In Michigan a chattel note is transferable and the assignee can sue upon it (Comp. L. § 5775) and trover lies for its conversion.

A bailee of a note who gives it up, without authority, to be destroyed is liable for its conversion.

The Supreme Court does not weigh testimony in law cases, or judge of its truth.

Error to Kent. Submitted June 29. Decided July 1.

Trover. Plaintiff brings error. Reversed.

C. G. & W. W. Hyde for plaintiff in error. A promissory note can be converted: *Burrows v. Keays* 37 Mich. 433; where one is only authorized to deliver a note to another, any other disposition of it is conversion: *Fisher v. Kyle* 27 Mich. 454; *Stewart v. Martin* 4[illegible]t. 266; *Kingman v. Pierce* 17 Mass. 247.

D. E. Corbitt for defendant in error.

Cooley, J. This case originated in justice's court, and was removed to the circuit court by *certiorari*. Hicks was plaintiff in the justice's court, and counted upon the conversion of a chattel note which was payable in cedar posts. In justice's court he recovered judgment which was reversed in the circuit court.

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The sole questions which we find to be open to us on this record are—*First*, whether such a note is the subject of conversion; and *second*, if so, whether there was in the case any evidence tending to show a conversion. On both these questions the case is with the plaintiff.

A chattel note in this State is the subject of transfer, and suit may be brought upon it in the name of the assignee. Comp. L. § 5775. As respects this action, therefore, it does not differ from a promissory note; and the right to bring trover for a promissory note is unquestionable. *Rose v. Lewis* 10 Mich. 483. The evidence of conversion in this case was that the note was left with Lyle, together with other papers belonging to different persons, to be delivered to the several persons owning them, and that the maker of this note, by means of the false statement that he had paid it up with the exception of two dollars, induced Lyle to give it up for that sum, and immediately destroyed it. The maker of the note admitted that his statement was false, but he added that Lyle knew it at the time. It is probable this was false, but we do not weigh testimony or judge of its truth. There was certainly evidence tending to show that Lyle delivered the note to the maker for destruction without any authority therefor; and this was evidence of a conversion.

The judgment of the circuit court must be reversed with costs of both courts and that of the justice affirmed.

The other Justices concurred.

WILLIAM B. RANSOM v. JAMES B. SUTHERLAND.

Execution for deficiency on foreclosure—Practice—Retainer does not extend beyond decree—Costs.

Execution for deficiency can issue against the defendant in foreclosure only on a sworn petition or application in writing, reciting the facts which give the right to it, and praying the court to direct its issue.

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An application for the issue of an execution for deficiency on foreclosure must be served, wherever practicable, on the defendant against whom the relief is sought, and notice must be given him of the time when the application will be presented; if personal service cannot be had, the court may direct substituted service on a showing of the facts.

Retainer of a solicitor is not presumed to cover proceedings taken subsequent to the decree and for its enforcement.

A defendant in foreclosure against whom execution is sought for a deficiency can resist the application only on grounds that are not inconsistent with the decree and such as usually operate in its discharge.

An answer to an application for an execution for deficiency on foreclosure must state the grounds of objection thereto, and must be sworn to and placed on file.

If an answer to an application for an execution for deficiency on foreclosure presents matter of discharge, complainant may take issue on it, and in proper cases the court may order a reference to take proofs.

A decree in foreclosure adjudging defendant personally liable for a deficiency, taken together with the report of the deficiency, make out a *prima facie* case against him; and on resisting an application for an execution against him he has the burden of showing matter in discharge of the decree.

Where both parties in a chancery proceeding mistook the practice, and there were no special equities in defendant's favor, he was allowed, on reversal, to recover the costs of printing the record and his brief in the Supreme Court, but in other respects each party was left to pay his own costs.

Appeal from Berrien. Submitted June 29. Decided July 1.

Motion for execution for deficiency on foreclosure. Defendant appeals. Reversed.

Clapp & Fyfe for complainant.

N. A. Hamilton for defendant.

Cooley, J. The misapprehension in respect to the proper practice in this case has been such as to necessitate a reversal of the order which is appealed from.

In August, 1879, Ransom took decree against Sutherland and others in a foreclosure case. The decree adjudged

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Sutherland to be personally liable upon the mortgage debt. A sale under the decree of all the land described therein was made October 8, 1879, and the commissioner reported a deficiency, after applying the purchase money on the decree and costs, of $583.61. December 30, 1880, complainant's solicitors served on the solicitor who had appeared for Sutherland in the foreclosure case a notice that on the third day of January, 1881, they would move the circuit court for an execution against Sutherland for "such deficiency as may remain unsatisfied on the decree rendered in this cause." The notice stated that the motion would be based "on the files, decree, report of sale and subsequent proceedings had in said cause." At the time specified said solicitor for defendant appeared and objected that no notice of the motion had been personally served on the defendant. This objection was overruled, and time was allowed to answer the motion. January 19, 1881, the solicitors being in court, defendant's solicitor moved to dismiss the application for the want of any proper showing that complainant was entitled to execution. This was denied. He then assumed to file an unsworn answer for the defendant, denying any indebtedness, but the terms of the denial were obviously such as to dispute the justice or validity of the decree, and of course presented no issue which was then material. The complainant produced the decree and the report of sale and deficiency as evidence of his right to an execution, and the court ordered that an execution issue. Sutherland appealed.

The whole proceeding was informal; and while it might have been sustained had no objection been made at the time, the irregularities are such as the defendant had a right to take advantage of. The application should have been made on sworn petition, reciting briefly the facts giving the right to an execution, and praying the court to direct its issue. It is not absolutely essential that the application take the form of a petition; but it should be in writing and under oath, and it should be served on the party against whom execution is sought, with notice of the time when it will be presented. The service should be on the defendant in per-

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son, wherever that is practicable; for presumptively the retainer of a solicitor in a cause does not extend to proceedings taken subsequent to the decree for its enforcement. If personal service on the defendant is impracticable, the court, on a showing of the facts, may direct a substituted service.

When the defendant is brought in on petition and notice, if he contests the right to an execution, he should file his answer setting out the grounds of his objection. It is hardly necessary to say that these must be grounds not inconsistent with the decree and usually such as operate in its discharge: the validity or justice of the decree cannot be inquired into on such an application. The answer, like the application, should be on oath, and if it present matter of discharge, the complainant may take issue upon it, and the court in proper cases may order a reference to take proofs. But in such a case the burden of proof to show discharge must be on the defendant, for the decree adjudging the defendant personally liable, and the report of the deficiency, make out a *prima facie* case against him.

The order appealed from must be reversed. As the costs are in our discretion, and nothing in the record indicates that defendant is relying upon any matter of discharge, we are not inclined to award full costs. Both parties seem to have mistaken the practice, and there are no equities apparent which entitle the defendant to special consideration. The order will therefore be reversed, and the defendant may recover the costs of printing the record and brief in this court, but in other respects each party will be left to pay his own costs.

The other Justices concurred.

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JACOB BOSSENCE v. GEORGE W. JONES.

Justices' courts must wait an hour for defendant.

A justice of the peace must wait for the defendant for an hour after the time fixed for hearing, in any cases in which the plaintiff is allowed that time by Comp. L. § 5373.

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Error to Lapeer. Submitted June 29. Decided July 1.

Assumpsit. Defendant brings error. Reversed.

C. P. Thomas and *George Mott* for plaintiff in error. Justices of the peace should wait a full hour for the parties to appear: *Shufelt v. Cramer* 20 Johns. 309; *Sherwood v. S. & W. R. R. Co.* 15 Barb. 655.

Moore, Bentley & Palmer for defendant in error.

Graves, J. The only question raised by this record is whether a justice of the peace ought to wait an hour for the defendant to appear in the same cases in which by the terms of the statute such time is given to the plaintiff. The subject was referred to in *Smith v. Brown* 34 Mich. 455, and notice was taken of the general practice to apply the same rule to the defendant as to the plaintiff. The distinction made by the words of the statute is not easily explained. No good reason is perceived for giving an additional hour to the plaintiff and withholding it from the defendant. It is the policy of the law that full opportunity shall be allowed for a fair hearing in these courts of the litigation which is proper to them, and justice requires that both parties shall have equal chances, and any rule likely to lead to what are called snap judgments cannot have any presumption in its favor. The popular understanding has always been that a delay of an hour for a defendant was legal, and it is not improbable that the Legislature supposed that the practice was already so firmly fixed as to supersede the necessity for any express reference to it. But however this may be it is certain that the justice ought to wait a reasonable time for the defendant and that, by analogy to the time allowed for the plaintiff, may well be regarded as an hour. This accords with the general usage and common opinion and is in every view favorable to justice.

The judgments of both courts must be reversed with the costs of all.

The other Justices concurred.

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The Victor Sewing Machine Co. v. Julia A. Jacobs and Albert H. Jacobs.

Fraud against creditors—Executed parol arrangements for transfer.

A decedent's estate was bid in on foreclosure for the benefit of the widow and heirs, and the purchaser conveyed it to the widow for the benefit of an invalid son to whom, in pursuance of this arrangement, she afterward conveyed the title thus received. Meanwhile she became liable as a surety, and her creditors having obtained judgment against her, in a suit brought after these arrangements were carried out, filed a bill to set aside the deed to her son. *Held* that he had prior equities and that the bill must be dismissed.

Where a bill to set aside a deed sets up arrangements which are admitted and which do not appear, as alleged, to be lacking in any legal formalities, it must be assumed that they are legal and could be proved if not admitted.

Where unwritten arrangements for the transfer of title are such that, if violated, proceedings would lie to vindicate them as against actual or constructive fraud, and where they are carried into execution and cease to be executory before the grantor's liability to a third person is perfected, it is doubtful how far the latter can set up previous informalities against the deed in a proceeding to set it aside as in fraud of creditors.

Appeal from the Superior Court of Grand Rapids. Submitted June 29. Decided July 1.

Bill in aid of execution. Defendants appeal. Reversed; bill dismissed.

Albert H. Standish for complainant.

Isaac H. Parrish for defendant.

Campbell, J. The bill in this cause is filed in aid of an execution against Julia A. Jacobs and two other judgment debtors, to set aside a conveyance from her to Albert H. Jacobs, as fraudulent and voluntary. The deed was made August 28, 1877, and the judgment was rendered in a suit subsequently commenced on a suretyship undertaking made in 1873.

The deed would undoubtedly be void as against complain-

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ant, unless made good by equities in favor of the grantee. Those equities are set up and agreed upon as follows:

Julia Jacobs was widow of Benjamin F. Jacobs, who died many years ago, leaving as his heirs at law eight children, including Albert. After his death a mortgage which existed on this land, of which he died seized, was foreclosed in chancery, and the estate was bid off by Wilder D. Foster, for the benefit of the widow and heirs. It was subsequently agreed among them that the property should be conveyed by Foster to some one of the family for the benefit of Albert, who was an invalid, and the title that Mrs. Jacobs conveyed to him had been received by her to carry out the arrangement. We omit some particulars amplifying the arrangements.

There is no evidence given, and no admission, of any actual fraud, and the whole case depends on the claim that the conveyance was voluntary.

It can hardly be doubted that these facts create an equity in Albert which was prior to any supposed equities of complainant.

But it is claimed that no agreement is made out that he could have enforced, under the statute of frauds. This position cannot be taken under the record. When arrangements are set up and admitted, which do not appear as alleged to have been lacking in any legal formalities, it must be assumed that they are legal, and could have been proved if not admitted. It is moreover highly probable that whether dependent on writings or not, the arrangements were such that if violated they might have warranted proceedings to vindicate them as against actual or constructive fraud. And inasmuch as they were carried into execution and ceased to be executory, before complainant brought suit at law, it is very questionable how far previous informalities could have been set up against the deed.

Upon the whole case we think complainant has no right to disturb the deed. The decree must be reversed and the bill dismissed, with costs of both courts.

The other Justices concurred.

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PETER N. ELLAIR, RELATOR v. WAYNE CIRCUIT JUDGE.

Wills—Dismissal of appeal from probate—New issues—Certiorari.

New issues need not be framed in the circuit court in will cases.

Dismissal of an appeal from the probate of a will is a final judgment which remands the proceedings to the probate court, and which cannot be set aside if not complained of within the two years allowed for removing proceedings to the Supreme Court on error or *certiorari*.

Costs may be granted against a circuit judge on allowing a writ of mandamus to compel him to vacate an illegal order.

Mandamus. Submitted June 29. Granted July 1.

Ed. E. Kane for relator. An order dismissing an appeal from the probate of a will is a final judgment in the case: Bouv. Law Dict. tit. "Judgment;" 3 Bl. Com. 395; Freeman on Judgments (2d. ed.) §§ 2, 16; *Insurance Co. v. Swift* 12 Minn. 444; *Belt v. Davis* 1 Cal. 138; and if irregular a motion to correct it must be prompt: *Creveling v. Moore* 39 Mich. 565; *Montgomery v. Merrill* 36 Mich. 104; *Rogers v. Rogers* 1 Paige 188; *Verplank v. Hall* 21 Mich. 471; *O'Flynn v. Eagle* 7 Mich. 308; *Smith v. Mitchell* 9 Mich. 261; *People v. Calhoun Circuit Judge* 1 Doug. (Mich.) 419; *Nichols v. Nichols* 10 Wend. 560.

George H. Prentis for respondent.

CAMPBELL, J. Relator seeks a *mandamus* to vacate an order of respondent restoring an appeal which had been previously dismissed.

The appeal was dismissed December 13, 1876, for a failure by the appellant from the probate of a will to file a declaration on appeal. The order to restore it was made on a motion entered April 12, 1880.

It has been frequently held that no new issues need be framed in the circuit court in will cases. But nevertheless the dismissal was a final judgment which remanded the pro-

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ceedings to the probate court, and which could not be set aside unless complained of within the proper time. We need not inquire whether the circuit court would have the right to act at any time within two years. It certainly could not interfere after the time had expired for removing the order complained of to this court. No writ of error or *certiorari* would lie from this court after two years unless in cases specially saved by statute for disability, and no such case is presented here.

In the present case more than three years had elapsed before any attempt was made to restore the cause which had been dismissed. This was too late, and the action was illegal.

A *mandamus* must issue as prayed, with costs.

The other Justices concurred.

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OCTOBER TERM 1881.

JOHN DOWNEY v. GEORGE HENDRIE.

Street cars—Contributory negligence—Accident to passenger.

It is contributory negligence for a passenger of ordinary common sense to sit on the driving-bar of a street car even at the driver's invitation if there is room for him inside the car.

Courts must take judicial notice of what everybody knows with regard to the incidents of railway travel.

In an action for an injury caused by falling off the front rail of a street car, and being run over, the defendant's testimony, which was not contradicted, showed that the driver made every effort to rescue the plaintiff as he fell, and stopped his car as soon as he could. *Held* that so far as running over him was concerned there was no question of negligence, on defendant's part, to go to the jury.

Error to Superior Court of Detroit. Submitted June 23. Decided October 5.

CASE. Plaintiff brings error. Affirmed.

Don. M. Dickinson (*Griffin, Dickinson, Thurber & Hosmer*) for plaintiff in error. A passenger is not guilty of contributory negligence in taking a position to which he has been invited by the conductor: *Burns v. Bellefontaine Co.* 50 Mo. 139; *Clark v. Eighth Ave. R. R. Co.* 36 N. Y. 135; nor if the position is occupied by consent of the conductor, or with his knowledge without objection: *O'Donnell v. Allegheny Co.* 59 Penn. St. 239; *Dunn v. Grand Trunk R. Co.* 58 Me. 187: 10 Am. Law Reg. (N. S.) 615; *Carroll v. N. Y. etc. R. R.* 1 Duer 571; *Jacobus v. St. Paul R. R. Co.* 20 Minn. 125; *Washburn v. R. R. Co.* 3 Head (Tenn.) 638; *Phila. v. Derby* 14 Howard 468; a man is bound to take reasonable care of himself; but whether he does this or not, it does not relieve anybody else from the duty of also taking

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reasonable care: *Radley v. London etc. R. R.* L. R. 10 Exch. 100; *Davies v. Mann* 10 M. & W. 546; the doctrine of contributory negligence and its qualification is well stated by Lord Penzance in *Radley v. London etc. R. R.* (1876) L. R. 1 App. Cas. 759; though plaintiff's negligence may have contributed to the accident, yet if defendant could, by the exercise of ordinary care, have avoided the mischief which happened, plaintiff's negligence will not excuse him: *McCune v. B. C. R. & N Ry. Co.* 52 Ia. 600; *Morris v. C. B. & Q. R. Co.* 45 Iowa 29; Cooley on Torts 674 and cases.

Brennan & Donnelly for defendant in error. A street railway passenger must keep himself within the limits provided for his accommodation, and if he places himself in a dangerous position he must do so at his own risk: *Todd v. Old Colony R. Co.* 3 Allen 18: 7 Allen 208; *Hickey v. Bost. & Lowell R. R.* 14 Allen 429; *Pittsburg R. R. v. McClurg* 56 Penn. St. 294; *Indianapolis R. R. v. Rutherford* 29 Ind. 82; *Spooner v. Brooklyn City R. R.* 31 Barb. 419; *Tregear v. Dry Dock Railway* 14 Abb. Prac. (N. S.) 49.

GRAVES, J. The plaintiff having taken passage on a street car of the defendant fell from the car and the wheels crushed his elbow. He was between forty and fifty years old, a butcher and dealer in fat cattle, had lived many years in Detroit, was familiar with street cars and with that which injured him. He brought this action to recover for the injury and when the evidence was closed, the learned judge being of opinion that it was too obvious to be questioned that the plaintiff's own negligence was the material if not the exclusive cause of his being hurt directed a verdict for defendant. It is now urged that in view of the state of the evidence the plaintiff was entitled to have the sense of the jury on it.

The facts of negligence alleged as the cause of injury are claimed to present two separate grounds of recovery; and viewing the declaration under this theory, and as favorably as possible for the plaintiff, they may be stated substantially

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as—*first*, assigning the plaintiff to a seat from which there was danger he would be thrown and injured in case of a sudden jerk of the car and then causing such jerk by starting up the horse by a blow of the driver's whip; and *second*, negligently running over the plaintiff after he had been thrown from the car to the track.

Whatever color is found in the case for the claim made by the plaintiff's counsel for a submission to the jury on the ground first mentioned, is confined to the plaintiff's own testimony. He entered the car at the rear end, passed right through to the front platform where the driver stood, and sat down, with his back out, on the driving-bar, a thin iron rail not exceeding an inch in thickness. The car was moving at a moderate pace, and when it had gone a short distance only, the plaintiff fell off backward and the wheels passed over his arm.

There was no conductor except the driver and fare was paid at a box placed at the front door. Both doors were standing open, and the plaintiff, as he testified, went forward to pay his fare, at which the driver called him out and invited him to be seated on the bar and he seated himself accordingly. That there was abundance of unoccupied seating room inside the car and that he was not hindered by any one from sitting there. That the car had moved about one block when the driver struck the horse and "tipped" plaintiff over. That the blow caused the car to "jump him right off." There is no evidence that the driving of the car was not according to the usual and proper mode.

This part of the case is not much pressed; but the point is understood as being, that granting the driving bar to have been, as the plaintiff knew, a dangerous seat, and also admitting that the fact of his occupying it was a proximate contributory cause of his injury; yet as his sitting there was on the driver's invitation it ought not to be reckoned as coutributory negligence. There is no doubt that it has been laid down as a rule that an assignment of the passenger by the carrier to a position of danger may in case of injury estop the carrier from setting up the occupation of that

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position as contributory negligence. But the rule is plainly not one of universal application.

Regard must be had to the passenger's capacity to look out for himself; to the opportunity there may be to get a safer position; to the distinctness, certainty and extent or degree of the peril, and so on.

Take the case of a child, and the case of a man every way qualified to take care of himself; the case where the position given seems tolerably safe and no better one is perceived; and the case where it is manifestly one full of danger and a safe one is known which is equally accessible. It would be very unreasonable to apply the rule equally to all. May the ordinary passenger, with his eyes open and with abundant accommodations before him which are safe, accept an invitation from the carrier to ride on the cow-catcher, and then, if injury arise from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being and in substance to stultify himself in order to cast a liability on another.

"Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all." *Siner v. Great W. Ry. Co.* L. R. 4 Ex. 123; *Dublin, Wicklow & Wexford Ry. Co. v. Slattery* 3 App. Cas. 1155: 24 Eng. 713; *Lake S. & M. S. R. R. Co. v. Miller* 25 Mich. 274. And in the example put the negligence would be so obvious and its commission so palpably and certainly inexcusable that a court would not be justified in treating the question of the passenger's responsibility as an open one. A direct charge would be called for.

Other cases may be supposed where from the nature of the circumstances a blind acceptance of the carrier's suggestion, however hazardous, would not so clearly reveal the passenger's disregard of that primary duty which rests on every one to exert his own will and judgment to guard against needless perils, as to justify the judge in taking the matter from the jury. No doubt the riding on a cow-catcher,

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would, to ordinary apprehension if not in fact, be an exposure to consequences more serious than any at all probable to arise from riding on the driver's bar of a street car in the way in which the plaintiff rode on this occasion; but the unfitness of the situation and the fact that it involves great risk of some injury more or less severe and is therefore one of extreme danger, is just as conspicuous in the one case as in the other.

Indeed the proposition is a plain one that different exposures to material bodily injury may be equally great, whilst the severity of the injuries threatened by the exposures may be entirely different.

Was there any proper case to be submitted on the second ground? The position taken here is that supposing the plaintiff's fall to have arisen from his own carelessness, yet that the defendant was then bound to use ordinary care to avoid hurting him, and that there was evidence before the jury tending to show that he did not. The argument for this view concedes that the evidence given for the plaintiff affords no basis for it, and that the record contains nothing to countenance it except the testimony of Mr. Whiting, a witness for the defendant. The various witnesses had different opportunities for seeing what took place, some noticing one incident and some another, and each has explained in his own style how matters looked to him, in his position and under his state of mind and attention. But as to the point under consideration the testimony of no one derogated from the current tendency.

We shall not pause to examine the right of a trial judge to step aside from the plaintiff's evidence and take up and put to the jury as an account on which a finding for the plaintiff would be regular the statements of a witness on the other side who assumes to give only a part of the transaction and shows that he was not in a situation to see the rest and did not see it and whose testimony as far as it goes is reconcilable with the other evidence for the defence. The inquiry is unnecessary because the case may be well disposed of on the theory of plaintiff's counsel.

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What were the circumstances so far as indicated by Mr. Whiting? He sat on the front seat next to the platform and with his back towards it and on the same side from which the plaintiff fell. He was engaged in conversation with Mr. Dyer. His position enabled him by a "side glance" to look out the window. The plaintiff fell backward from the rail and a noise occurred and the witness made a "side glance" and looking through the window saw the plaintiff clinging with both hands to the "dash-board." He was dragging on the ground nearly under the car and was so dragged about ten feet. The witness did not look towards the platform and did not see the attempt by the driver, as explained by other witnesses, to extricate or save the plaintiff. What he saw was by looking through the window and he did not see the driver. He says the car was going quite slow and when he discovered the plaintiff clinging to the "dash-board" the brake was on and the car under check and he thought the car was stopped as quick as possible. When we consider that the plaintiff was a heavy man, that he fell off backwards, that the driver had his horse and the brake to attend to, and actually caught hold of the plaintiff and tried to rescue him, and that the space of time between the fall and the injury could not have exceeded five seconds, it is impossible to say that there were any facts on which the jury could find that the defendant, after the plaintiff's fall, omitted to do anything which a street railway company of ordinary care would have done in the like circumstances.

I think the judge committed no error in ordering a verdict for the defendant, and that the judgment should be affirmed with costs.

The other Justices concurred.

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CHICAGO & NORTHWESTERN RY. CO. v. DENNIS SMITH BY GEO. W. HAYDEN, HIS NEXT FRIEND.

Injury to trespasser on railway premises.

An eight-year-old boy trespassing upon the premises of a railroad company got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started at that moment and the tender passed over his leg. He was a boy of more than average intelligence and had been warned against going on the premises or riding on the engine. *Held*, that the railway company could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury.

Error to Marquette. Submitted June 23-24. Decided October 5.

CASE. The declaration is here given.

STATE OF MICHIGAN, } ss.
MARQUETTE COUNTY. }

In the Circuit Court for the County of Marquette:

Dennis Smith, by Geo. W. Hayden, who is admitted by the court to prosecute for the said Dennis Smith, who is an infant within the age of twenty-one years, as the next friend of the said Dennis Smith, plaintiff herein, complains of the Chicago & Northwestern Railway Company, a corporation under the railroad laws of the State of Michigan, and doing business in said county of Marquette, defendant herein, of a plea of trespass on the case, filing this declaration, entering rule to plead, &c., as commencement of suit.

For that whereas, heretofore to wit: On the 11th day of October, A. D. 1879, and for a long time prior thereto, the said defendant was and still is in possession of a certain line of railroad operated by it, at the time aforesaid as such corporation, and running between the cities of Ishpeming and Negaunee, in said county of Marquette, and Chicago, in the State of Illinois.

That at the time aforesaid defendant was in possession of and used a certain railroad yard, with a large number of side

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tracks connected with its main line, running through the same, and a water tank adjacent thereto within the limits of the city of Negaunee, aforesaid. That said yard and side tracks at the time aforesaid, and for a long time prior thereto, were wholly unfenced and unenclosed, and were then and there at all times open, and were then and there contiguous to a public traveled highway in said city of Negaunee, and that said yard and tracks were interposed between a large number of dwelling houses occupied by residents of said city of Negaunee, situate on the south side of said tracks and the main portion of said city of Negaunee lying on the north side thereof; that the residents of said dwellings at the time aforesaid, and for a long time prior thereto, had used a roadway and foot-paths which then and there led across said tracks and yard from the dwellings, aforesaid, to said main portion of said city. That a great number of children who resided in said dwellings had been accustomed at the time, aforesaid, and for a long time prior thereto, to use the traveled roadway and paths, aforesaid, in going to and returning from school, and with them the plaintiff herein.

That the plaintiff at the time, aforesaid, was an infant of tender age, to-wit: of the age of eight and one half years and resided with his parents in one of the dwellings on the south side of said tracks, aforesaid, and closely contiguous thereto.

That the roadway and paths leading across said tracks, aforesaid, were nearly opposite the residence of the plaintiff and were the only direct route to the main business portion of said city, aforesaid, and to the public schools, and the same were at the time, aforesaid, and for a long time prior thereto, used exclusively by said plaintiff and his parents in going to and returning from the business portion of said city and said schools. That at the time, aforesaid, said defendant was possessed of and used a certain switch engine, to wit: numbered 140 for the purpose, among other things, of shunting cars on and about said side tracks across and about said railroad yard, and had employed thereon and in charge thereof at the time, aforesaid, an engineer and fireman for the purpose of operating the same for said defendant.

The said locomotive was provided with a step or platform reaching across the rear of the tender of said locomotive, attached to and a part of said locomotive, and attached to the rear thereof, and which step or platform was near to the ground and was used as such step or platform on which a

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person could stand and for the purpose of standing thereon while said locomotive was in motion and upon and from which it was easy to step to and from the ground. That the children residing in said dwellings, and among them the plaintiff, passing said yard and tracks, as aforesaid, had been accustomed to step upon said locomotive and others employed thereabouts, on the step, aforesaid, and ride to and fro.

That at the time, aforesaid, said locomotive was employed about said yards and tracks and was standing still on one of said tracks near the tank house, aforesaid, and had been so standing still for a long space of time, to-wit: one half hour at the time, aforesaid. That at the time, aforesaid, said plaintiff, without the fault or negligence of his parents or guardians, was standing near said locomotive and said tracks, and near to said tank house and to said traveled roadway and paths.

That while said locomotive was so standing still, as aforesaid, at the time and place aforesaid, the plaintiff, as he could easily do and without any negligence on his part, his parents or guardians, stepped upon said platform at the rear of the tender of said locomotive, as aforesaid. That while he was so standing thereon at the time aforesaid, the agents and servants of said defendant in charge of said locomotive, and while said locomotive was so standing still, suddenly ordered the plaintiff to get off said platform. That the plaintiff immediately undertook to comply with said order and to step down from said platform and get clear of the track on which said locomotive was standing, as aforesaid, and then and there while the plaintiff was engaged in such attempt, and while he was making as speedy an effort so to do as it was possible for him to make in such attempt, and immediately on so ordering said plaintiff off said platform and without waiting to enable him to do so, and without any warning whatever to plaintiff, the said agents and servants of said defendant in charge of said locomotive, suddenly and with great carelessness started said locomotive backward, in the direction in which plaintiff was attempting to get off and out of the way of said locomotive, at a high rate of speed, to-wit: at the rate of fifteen miles an hour, and then and there while said plaintiff was in the act of stepping from said platform and out of the way of said locomotive, as aforesaid, he was, by the wrongful conduct, carelessness and negligence of the said defendant, its agents and servants, as aforesaid, struck by the rear of said tender, as aforesaid, knocked down upon the track on which said loco-

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motive was backing, as aforesaid, and run over by the wheels of said tender, and then and there without any fault or negligence on the part of said plaintiff, his parents or guardians, and by means of the premises, and by and through the wrongful conduct, carelessness and negligence of said defendant, its agents and servants, as aforesaid, the leg of said plaintiff was cut off, and he then and there by means of the premises sustained the permanent loss of one leg, as aforesaid, and was rendered sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit: thence hitherto, and was then and there, as aforesaid, crippled, disfigured, maimed and mutilated for life and rendered incapable of performing any physical labor or of earning a livelihood, and by means thereof suffered, and still continues to suffer, great bodily as well as mental pain and anguish, and was then and there, as aforesaid, subjected to such pain and torture as will continue for life, and other wrongs the said defendant, by means of the premises, then and there did to the plaintiff all to his great damage and injury, to-wit: to his damage fifty thousand dollars, and therefore he brings suit, &c.

GEO. W. HAYDEN,
Next Friend in Person,
Plaintiff's Attorney.

Plaintiff recovered a verdict for $10,000 and defendant brings error. Reversed.

Dan. H. Ball, B. C. Cook and *A. M. Herrington* for plaintiff in error. Where a person is injured while trespassing on the premises of a railway company, the latter is not liable except for willful or wanton damage: *Illinois Central R. R. v. Hetherington* 83 Ill. 516; *Ill. Cent. R. R. v. Godfrey* 71 Ill. 506; *Johnson v. Bost. & Me. R. R.* 125 Mass. 75; *Railroad v. Norton* 24 Penn. St. 465; *Mulherrin v. Railroad Company* 81 Penn. St. 375; *Denman v. St. P. & D. R. R.* 26 Minn. 357; *Hargreaves v. Deacon* 25 Mich. 1; *Chic. & Alt. R. R. v. McLaughlin* 47 Ill. 265; *Gavin v. Chicago* 97 Ill. 67: 11 Cent. L. J. 475; *Phila. R. R. v. Spearen* 47 Penn. St. 300; *Meeks v. Southern Pacific R. R.* 20 Amer. Ry. Rep. 118; *Tol. W. & W. R. R. v. Grable* 88 Ill. 442; *Tol. W. & W. R. R. v. Miller* 76 Ill. 278; *Morrissey v. Eastern R. R.* 126 Mass. 377; *McAlpin*

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v. Powell 70 N. Y. 126; *Hestonville Passenger Ry. v. Connell* 88 Penn. St. 520; *Nagle v. Allegheny Valley R. R.* 88 Penn. St. 36: *Cent. Br. U. P. R. R. v. Henigh* 23 Kan. 347; *Atch. & Neb. R. R. v. Flinn* 24 Kan. 627; *Cauley v. Pittsburgh &c. R. R.* — Penn. St. —: 12 Cent. L. J. 281: 13 Chic. Leg. News 89; *Phil. & Reading R. R. v. Hummell* 8 Wright 378; *Phil. & Reading R. R. v. Long* 75 Penn. St. 265; *Duff v. Allegheny Valley R. R.* 27 Pitts. Leg. Journal 58; *Smith v. Hestonville M. & F. Pass. Ry.* 92 Penn. St. 451: 9 Rep. 454; *Bradbury v. Furlong* — R. I. —: 11 Rep. 413; *Balt. & P. R. R. v. State* 54 Md. 648: – Rep. 160; *C. B. & Q. R. R. v. Stumps* 69 Ill. 409.

G. W. Hayden for defendant in error. A trespasser on railway premises may recover for wanton or reckless injury inflicted upon him: *Daley v. Norwich etc. Ry.* 26 Conn. 591; *Chic. etc. Railway v. Murray* 71 Ill. 601; *Penn. Railway v. Morgan* 82 Penn. St. 134; *Penn. etc. Railway v. Kelly* 31 Penn. St. 372; *Lafayette etc. Railway v. Adams* 26 Ind. 76; *Johnson v. Chic. & N. W. Ry.* 49 Wis. 529; *Brennen v. F. W. etc. Ry.* 29 Amer. 679; *Kay v. Penn. Ry.* 65 Penn. St. 269; Whart. Neg. §§ 344, 388; Cooley on Torts, 674; even though he be of mature understanding: *State v. Manchester etc. Ry.* 52 N. H. 528; that which might not be wanton negligence towards a grown person may be so towards a child: *Penn. Ry. v. Lewis* 79 Penn. St. 33; *Robinson v. Cone* 22 Vt. 213; *Frick v. Railway* 5 Mo. Ct. of App. 435; *Benton v. C. R. I. & P. R. R.* 8. W.N Rep. (Iowa) 330; *Smith v. O' Connor* 48 Penn. St. 221; it is for the jury, in cases of doubt, to determine whether a child is *sui juris*: *Lovett v. Salem etc. Ry.* 9 Allen 551; *Karr v. Parks* 40 Cal. 188; *Honegsberger v. Second Ave. Ry.* 1 Keyes 570; *Drew v. Sixth Ave. Ry.* 26 N. Y. 49; *Oldfield v. Harlem etc. Ry.* 14 N. Y. 310; *Mangam v. Brooklyn etc. Ry.* 38 N. Y. 460; *Pittsburg etc. Ry. v. Caldwell* 74 Penn. St. 421; though children have been held not so as matter of law, at five

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years (*Jeffersonville etc. Ry. v. Bowen* 40 Ind. 545;) six (*Chic. v. Starr's Admin.* 42 Ill. 174;) and seven: *Pittsburgh etc. Ry. v. Vining's Admin.* 27 Ind. 513; the natural heedlessness of children should be considered: *East Saginaw etc. Ry. v. Bohn* 27 Mich. 513; negligence of parents or guardians does not excuse injury resulting to a child from the negligence of others: *Norfolk etc. Ry. v. Ormsby* 27 Grat. 455; *Cahill v. Eastman* 18 Minn. 324; *Bellefontaine Ry. v. Snyder* 18 Ohio St. 399.

MARSTON, C. J. While the witnesses do not fully agree upon the facts, yet in the view which we are compelled to take, the dispute becomes immaterial. The court charged the jury in substance and effect, that if they found the facts to be as testified to by the defendant's witnesses, the plaintiff could not recover, and the instructions given, as to the right of the company to a clear track, and the boy being a trespasser, that it could only be held liable in case there was gross and wanton negligence on its part, such negligence as would indicate an indifference to the safety of the boy, were undoubtedly correct. The important question in the case as submitted is whether the court should not have charged the jury, as requested, that under the evidence the plaintiff could not recover.

Taking the testimony of the boy, and accepting it as true in every respect, and there is no evidence in the case more favorable to the plaintiff, and it fails to show, or tend to show, that the engineer knew or had reason to know that he was there at all, and consequently there could have been no negligence on his part in starting the engine. Neither does the boy's evidence tend to show that the fireman knew or had reason to suppose, that he had fallen down, or was in any danger of being run over or injured—and certainly there is nothing in the whole case tending to show that any of the defendant's servants were wanton or willful in their conduct, or indicating a degree of indifference on their part as to the safety of the boy. Even should it be conceded that negligence on the part of the fireman would render the

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company liable, yet the evidence does not fairly tend to show that he had any reason to believe that the boy would not have ample time to clear the track, or that it was at all necessary for him to call the attention of the engineer to the fact that the boy was there.

It is not claimed that the boy would have been injured had he not, in some unaccountable way, fallen down, but there was nothing in his age, appearance, or knowledge of trains, or in the height of the step upon which he was standing from the track, to indicate or lead any person to suppose that he would fall. Falling under such circumstances would be an exception and not the rule, and cannot therefore be made the foundation for a liability against the company without proof of actual knowledge, which is wholly lacking in the present case.

The evidence is clear that the locomotive was in all other respects properly managed and under complete control of the engineer at the time of the accident, so that no charge of carelessness can arise thereon. We need not therefore dispose of this case upon any mere question of pleading, or because of any variance between the allegations in the declaration and the proofs, or whether the negligence of the fireman alone would be sufficient to charge the company. The evidence is all set forth in the record and it fails to indicate that degree of negligence, upon the part of any servant of the company, necessary to create a liability.

The evidence does show the boy to have been a trespasser; that he was possessed of more than average intelligence for one of his age; he knew that he had no right there, and repeatedly had been ordered away on previous occasions, and warned by his parents against going on the track or in places of danger; that when ordered off he would have escaped all injury but that he stumbled and fell, which was unknown to and could not have been anticipated by any person upon or in charge of the locomotive. In other words the injury resulted from an accidental fall of the boy and without any carelessness or negligence of the company's servants, and the jury should have been

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instructed that under the evidence the plaintiff was not entitled to recover.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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JULIUS ZOELLNER v. MARGARETHA ZOELLNER.

Divorce—Abatement by death—Delay in attacking decree

The death of the complainant in divorce extinguishes the suit and the whole ground of action, and though the proceeding itself survives, a defendant who has taken no appeal from a decree granted therein cannot obtain by petition a standing in court for the purpose of attacking the decree, and can only do so, if at all, by a new suit impleading the parties representing the property interests to be affected.

An unexcused delay of nine years, and until after the death of the other party, in attacking a decree of divorce, is fatal to a proceeding to set it aside for the purpose of obtaining an interest in decedent's estate.

The mere abatement of a suit in equity is a state of suspension with capacity for revival

Peace and good order require that equity shall not aid those who grossly neglect to take care of their own rights.

Appeal from Wayne. Submitted June 28. Decided Oct. 5.

PETITION to set aside a divorce. Petitioner appeals. Order dismissing petition affirmed.

Latham & Case and *John D. Conely* for petitioner. A decree of divorce may be vacated for fraud: *True v. True* 6 Minn. 458; *People v. Dawell* 25 Mich. 255; *Edson v. Edson* 108 Mass. 590; *Weatherbee v. Weatherbee* 20 Wis. 500; *Johnson v. Coleman* 23 Wis. 453; *Crouch v. Crouch* 30 Wis. 670; *Willman v. Willman* 57 Ind. 501; *Whitcomb v. Whitcomb* 46 Iowa 437; *Rush v. Rush* id. 648; *Whetstone v. Whetstone* 31 Iowa 276; *Mansfield v. Mans-*

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field 26 Mo. 163; *Lord v. Lord* 66 Me. 265; *Allen v. MacLellan* 12 Penn. St. 328; *Boyd's Appeal* 38 Penn. St. 246; *Plummer v. Plummer* 37 Miss. 185; *Newcomb v. Newcomb* 13 Bush 544; *Adams v. Adams* 51 N. H. 397; *Shumway v. Stillman* 6 Wend. 452; *Fiske v. Anderson* 12 Abb. Pr. 15; *Wright v. Douglass* 10 Barb. 111; *State v. Phœnix Bank* 33 N. Y. 25; there is no estoppel by laches from attacking it; *Holmes v. Holmes* 4 Lans. 388.

George Gartner and *Charles F. Burton* for respondent. A petition to vacate a decree for fraud should not be entertained if it does not allege any act which would constitute a fraud practiced on the court: 2 Bishop M. & D. § 7533; *Groff v. Groff* 14 S. & R. 181; *Johnson's Appeal* 9 Penn. St. 416; or if no proceedings were taken until after complainant's death, and defendant—petitioner—had acquiesced in the decree and proceedings for seven years with knowledge: *Campau v. Van Dyke* 15 Mich. 371; *McLean v. Barton* Har. Ch. 279; *Ford v. Loomis* 33 Mich. 122; *McVickar v. Filer* 31 Mich. 304; *Delancey v. Brownell* 4 Johns. 137; 2 Story Eq. Juris. § 1520; *German American Seminary v. Kiefer* 43 Mich. 105; if the petition is not filed from motives of public policy, but for pecuniary advantage: *Singer v. Singer* 41 Barb. 139; the allegations of this petition are insufficient: *McCraney v. McCraney* 5 Iowa 251; see also *McQuigg v. McQuigg* 13 Ind. 294; 2 Bishop M. & D. § 761; see also *Greene v. Greene* 2 Gray 361; *Parish v. Parish* 9 Ohio St. 534; in a divorce case, after decree, defendant cannot appear as a matter of right: Comp. L. § 5127-8.

Graves, J. September 26, 1872, a decree of divorce from the bonds of matrimony was granted complainant by the circuit court for Wayne county in chancery. The defendant was not personally served and did not appear. She was staying at her father's in Toledo in the state of Ohio and had been from the previous November, and the case purported to be carried on in virtue of an order of publication under the statute. In the fall of 1872 the complain-

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ant gave her notice of the divorce, and about the same time he entered into marriage with a woman by the name of Bittner who had recently been granted a divorce from a former husband. The decree against defendant has never been enrolled.

May 12, 1880, complainant died intestate leaving, as represented, real property amounting to $3000 and personal estate, including $2000 arising from a life insurance, of the value of $3000. Letters of administration were issued to Frederick J. Kunze and the woman whom Zoellner married after the decree against defendant, claims in character of his widow. March 31, 1881, the defendant Margaretha filed her petition to have the decree of divorce against her set aside on the ground that the order of publication and the showing therefor were false and fraudulent and an imposition on the court. A hearing was had on the petition and several accompanying affidavits, and the court denied the application and Mrs. Zoellner appealed.

A number of questions of considerable difficulty were referred to on the argument and others have occurred to the court since. But as we do not consider that the fate of this appeal depends upon them they will not be discussed. The case must be governed by our own mode of procedure, and be decided on grounds which are well recognized where other contentions not very different in their real object are in question.

First. The exclusive object of the suit against the petitioner was to sever the bond of marriage, and the death of her husband, the complainant, brought the suit to an end. There remained no longer in the case a party complainant to contend nor any subject-matter of contention. There was not a mere abatement in the sense of equity, which is a state of suspension with a capacity for revival. But the whole ground of action was extinguished. Mitford Eq. Pl. 58; Story Eq. Pl. § 356; Barb. Ch. Pr. book 4, ch. 1, p. 39.

Whatever effect there may have been on property interests was a result only of the change of *status* declared by the decree in the cause, and was not an end directly pro-

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duced by the cause itself. And no complaint of such effect by the petitioner upon any ground reaching back to the decree and turning on its validity, can be heard and decided in the old case, which, as just stated, is not only destitute of an opposing party but is not depending. The proceeding indeed survives, and supposing it to be assailable by the petitioner to enable her to regain a position carrying with it a right to property as against others now apparently entitled, her only course would be to proceed by a new suit with the proper parties representing the property interests liable to be affected. The application before us is not such a suit. It is a petition in the divorce case. This is certain. Not only the title and the body of the petition show it, but it is also evident from the entire course of proceeding. The application is against a deceased complainant and in a case which came to an end nearly a year before it was made.

In my judgment the petitioner obtained no standing in court, and that for the reasons here stated the denial of her application ought to be affirmed.

Second. Waiving all objections based on the manner in which the relief sought is applied for, and viewing the case as it stands explained by the petitioner, the court is of opinion that the decision of the court below should not be disturbed. Nothing is now involved except property. The sole motive of the petitioner in assailing the judicial proceeding which purported to sever her connection with the deceased complainant is to get, through a kind of *post mortem* adjudication, a share of the property he left. We think she was not disposed to attack the proceedings during his life-time, and when, if successful, the result would have been a revival of the state of marriage. But that she designedly abstained from moving until, in consequence of his death, the property interest might be pursued without the risk of any restoration of conjugal connection. The claim set up by the petitioner is therefore to be judged by the standard applicable to property questions. The decree in question is *prima facie* valid; and granting that it was obtained by the means asserted, still the facts are extrinsic,

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and are only provable by outside evidence. The case is, hence, one where the adjudication must subsist and operate as valid until overthrown by a judgment pronounced against it upon appropriate evidence.

Now, the decree of divorce, as we have noticed, was given in September, 1872, at the city of Detroit. The petitioner was at her father's, in Toledo, distant about two hours by railway, and she was very soon informed by complainant.

The defects in the proceedings which are now set up were open to detection by the least attention to facts which must have been obvious to her, and the notice from her husband, and the surrounding circumstances with which she was intimate, were urgent calls upon her to look into the proceedings. In short, if her present explanations are correct the facts of which she had full knowledge implied conclusively that the decree was a fraud, and there is no reason to suppose that she was not then as eligibly situated to take action as she is now. And although she continued in the same near neighborhood, she yet waited from the fall of 1872 until the 31st of March, 1881, an interval of between eight and nine years, and including in it the period of more than seven and a half years whilst complainant was living and the space of nearly a year subsequent to his death. And the case is bare of circumstances to palliate the delay.

The proceeding is consequently subject to the proposition that the public peace and good order are concerned in withholding the assistance of equity from those who grossly neglect to take care of their own rights.

The order must be affirmed.

The other Justices concurred.

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The City of Grand Rapids v. George L. Wyman.

Injury from defect in highway—Municipal negligence.

A city under the statute of 1879, (Gen. Laws, p. 223), is liable to a party who is injured by reason of a defect in one of its streets along which he is passing: *Burnham v. Byron*, post, p. 555.

In an action for such an injury it is not proper evidence on the part of the defence that persons living in the immediate vicinity had not noticed the defect, which had existed for several days.

The plaintiff was permitted to show, as bearing on the question of municipal negligence, that similar defects had often been suffered to continue for a considerable time without attention. *Held*, no error.

Error to Superior Court of Grand Rapids. Submitted June 28. Decided Oct. 5.

Case. Defendant brings error. Affirmed.

City Attorney *William J. Stuart* and *Stuart & Sweet* for plaintiff in error.

H. H. Drury and *E. A. Maher* for defendant in error.

Cooley, J. The defendant in error recovered judgment against the city of Grand Rapids for an injury occasioned by his horse stepping into a hole in one of its streets while he was riding along the street on horseback. His evidence tended to show that the hole was dangerous, and that it had existed for some ten days without any steps being taken by the city authorities to fill up or cover it. The city contested its liability for such injuries in all cases, and also took some special exceptions to the proofs, which were made to show negligence in this particular instance.

It was decided in *Detroit v. Blackeby* 21 Mich. 84, that municipal corporations in this State were not liable to those who, in making use of the public streets, were injured in consequence of the streets being out of repair. Since that decision the Legislature has twice acted upon the subject,

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and by an act passed at the session of 1879, has clearly evinced its intent that townships, cities and villages shall make compensation for such injuries. The legislation is explained in *Burnham v. Byron*, post, p. 555, decided herewith. Whatever doubts may have heretofore existed respecting the liability of the municipalities for injuries occasioned by neglect to keep the public ways in repair, must be considered as finally settled by this legislation.

Numerous exceptions to the rulings of the court in the admission and rejection of evidence appear in the record, but in most cases the court was acting within its legitimate discretion and its decision was final. A few rulings will be noticed. The hole into which the plaintiff's horse stepped was shown to have been in existence some ten days, but the defence offered to show that persons living in the immediate vicinity had not seen it. The proposed evidence was not received. There might have been no error in receiving it, but it could have had no real significance. It was the duty of the city to look after such defects in the streets, and it might be negligent in allowing such a hole to remain though the immediate neighbors had never had their attention attracted to it. The defence also offered to show that there were but two street commissioners for the whole city, and upon this showing it was proposed to argue that there was no corporate negligence because these two officers, however active and diligent they may have been, could not possibly supervise the streets of so large a city so as to discover at once and remedy all such defects. But no such argument was admissible. The statute having imposed the duty of repair and the liability for neglect, the city at its peril must do whatever is needful to protect itself against actions for injury. As bearing upon the question of negligence, the plaintiff was suffered to show that similar defects were frequently suffered to continue for a considerable time without attention from the public authorities. This evidence might well have been excluded, for it was wholly immaterial. The jury had nothing to do with any negligence except that which had resulted in the injury counted upon; and the neglect in

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this case was shown by the defect being left so long without attention, and was neither greater nor less because of previous carelessness or previous attention. But we do not see how the evidence could do injury. No importance was attached to it in submitting the case to the jury.

The defect in the street was outside, but on the border of the wagon track, and the defence sought to raise a question of contributory negligence; but there was no room for it on the evidence. The case was fairly tried and we discover no error.

The judgment must be affirmed with costs.

The other Justices concurred.

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SIDNEY BERRY v. WILLIAM P. INNES.

Alteration by ex parte proceedings of decree for specific performance.

An action at law does not lie for damages resulting from the neglect to obey a decree requiring the specific performance of a contract, where the decree itself was unwarranted, as where it has been changed on an *ex parte* application and without notice to the defendant.

Case made after judgment from Kent. Submitted June 28. Decided Oct. 5.

CASE. Defendant had judgment below. Affirmed.

E. A. Maher for plaintiff.

Norris & Uhl for defendant.

GRAVES, J. Prior to July 14, 1859, the defendant Innes contracted a certain body of land to Ernst & Nixon and also another one to W. & E. Trill, and Berry claims that Innes on that date through his attorneys Ives & Martindale assigned to him the said contracts and bound himself to convey to him the property, subject only to such rights as were held by said purchasers under their contract. In July, 1861,

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he filed his bill against Innes for specific performance, and joined Ives & Martindale and a person by the name of Price as defendants. The purchasers by contract, Ernst, Nixon and the Trills were not made parties.

On the 23d of August, 1873, the court made a decree in Berry's favor; which, after finding and adjudging that the interest possessed by Innes at the time Berry became assignee, amounted to $1200, proceeded to decree that Innes should convey to Berry by deed containing the usual covenants of a warranty deed, but saving from the operation of the covenants whatever rights existed or might arise in favor of said purchasers by contract, or their privies. The case had proceeded without the filing of any notice of its pendency and on the 21st of February, 1868, the premises were conveyed by Innes and wife to George Jerome. April 10, 1874, the decree was allowed to be altered *ex parte;* and a year later the court adjudged Innes guilty of contempt for not having made conveyance in accordance with the decree.

An appeal was taken from that order to this court and the proceeding for contempt was reversed. *Berry v. Innes* 35 Mich. 189.

After saying that Innes was not bound at his peril to prepare and execute such a deed as the decree called for, the court added these material observations: "But we also think the decree could not lawfully have been amended without notice; and though the amendment could not injure this defendant, yet as the decree itself appears to be in some particulars not warranted by the case made, we think the defendant should be allowed to take advantage of the error. The order appealed from will, therefore, be reversed, with costs, and leave given to file a bill of review. If the parties cannot now agree what their respective rights are, and settle them without further litigation, Nixon, Ernst and the Trills ought in some manner to be brought before the court."

The order of reversal was made October 25, 1876, and a certified copy was filed in the court below on the 7th of September, 1877, and the case implies that Innes filed a petition for leave to bring a bill of review and attached

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thereto a copy of the bill he desired to bring. No other proceedings were taken in that suit and on November 4, 1879, Berry commenced the present action at law; the suit being a special action on the case to recover damages for the alleged neglect and refusal of Innes to execute and deliver the deed in accordance with the before-mentioned decree.

The hearing proceeded without a jury and the judge on special findings decided in favor of defendants and the plaintiff seeks a review of the decision on a case made. The action is a novel one. Nothing like it is mentioned by counsel or is remembered by the court. Still, if the principle is sound the bare fact that this is the first example ought not to defeat the plaintiff. But is the principle sound? We think not, and many reasons are suggested for this opinion. But it is idle to multiply objections.

We shall not presume to overhaul the practice in the equity case. We are not sitting in review of that suit and the occasion is not a proper one for inquiring in regard to errors and irregularities alleged to have been committed in it. It is sufficient for the present purpose to give attention to the views expressed on the hearing of that cause on the appeal.

The real position of the plaintiff is that the original decree by the circuit court is valid, and that Innes committed an actionable grievance in neglecting to obey it. That it imposed a duty on Innes, which the courts are bound to regard, to execute the deed to Berry, and that his failure to perform the duty by deeding as directed by the decree, created a ground of action at common law for the recovery of damages. Now if the duty supposed did not arise upon the decree, the action at law falls to the ground on its own theory, and recurring to our ruling on the occasion of reversing the order in the contempt proceeding, it is seen that we then held in substance that it did not. We thought that the case was too faulty and defective to warrant any coercive steps against Innes and that further proceedings of some kind would be necessary to place him at fault for not deeding as directed by the decree. That determination is

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consequently decisive against the very principle relied on to justify this action.

In the present state of the controversy the plaintiff must look to some proper use of the suit in equity in the court of equity to obtain any substantial relief.

The judgment is affirmed with costs.

The other Justices concurred.

SPINK JAKWAY v. LUMAN JENISON ET AL.

Mortgage—Evidence of record—Assignment—Defeat of foreclosure.

The certificate of the registry of a mortgage, required by Comp. Laws § 4229, to be indorsed thereon, is evidence of its record.

Where the record of the assignment of a mortgage is duly witnessed and recorded, it cannot be assumed that it was not properly recorded.

It seems the foreclosure of a mortgage cannot be defeated by presumptions in favor of an issue made by a subsequent encumbrancer as to the assignment of the mortgage, if such encumbrancer had not relied upon the records or upon inquiry in taking an interest in the premises in suit.

Appeal from Kent. Submitted June 28. Decided Oct. 5.

BILL of foreclosure. Complainant appeals. Reversed; decree granted.

Godwin & Earle for complainant.

John C. FitzGerald for defendants. The record of an instrument is not *prima facie* evidence that it is annexed to another instrument that has not been recorded: *Bassett v. Hathaway* 9 Mich. 31; *Martindale v. Price* 14 Ind. 119; *Sanger v. Craigue* 10 Vt. 555; *Frost v. Beekman* 1 Johns. Ch. 298; *Jennings' Lessee v. Wood* 20 Ohio 266; *Sawyer v. Adams* 8 Vt. 172; 3 South. Law Rev. (N. S.) 540, nn 5 and 6; an instrument which does not directly or indirectly describe the land to be affected by it, cannot be recorded:

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Pringle v. Dunn 37 Wis. 449; an assignment of a mortgage is invalid as against a subsequent purchaser without notice, or the grantee of a subsequent mortgage, unless it is of record: *Bank v. Anderson* 14 Iowa 555; *McClure v. Burris* 16 Iowa 591; *Cornog v. Fuller* 30 Iowa 212; *Jones v. Smith* 22 Mich. 367; *Bacon v. Van Schoonhoven* 19 Hun 161; the assignee of a mortgage is entitled to the protection of the recording acts and, if he buys in good faith and for a valuable consideration, is not chargeable with any notice his assignor had, of prior encumbrances on the property: *Bloomer v. Henderson* 8 Mich. 402; *Trustees of Union College v. Wheeler* 59 Barb. 617; *Moore v. Metropolitan Nat. Bank* 55 N. Y. 41; *Belden v. Meeker* 2 Lans. 470; *Murray v. Lylburn* 2 Johns. Ch. 441.

CAMPBELL, J. The bill was filed in this cause to foreclose a mortgage made on the first day of February, 1859, by Egbert Dewey and Joseph Blake, and wives, to Ransom E. Wood, for $4000, and interest, payable in four instalments on the first day of February in each of the years 1861, 1862, 1863, 1864. Wood assigned October 10, 1859, to Harmon Noble and Belden Noble, and on the 23d of September, 1867, their survivor assigned to complainant. The Noble assignment was recorded on the day of its date, and again in December, 1876, the original record having been destroyed by fire. The assignment to complainant was also recorded in December, 1876.

Some question was made on the argument whether there was any proof of the earlier record, but the original mortgage with the assignment indorsed thereon was produced, having the certificate of registry required by § 4229 of the Compiled Laws, which is evidence of such record.

The defence is made by several subsequent purchasers and incumbrancers, claiming that the mortgage was paid before they obtained their interests. This defence is rested on various facts and reasons, some of general and some of special application. As the foreclosure was begun within a little over thirteen years after the maturity of the last instalment there

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is no room for the claim that the security was cut off by delay.

The payment in fact is put chiefly on the ground that one Horace O. Weston, a brother-in-law of complainant, purchased half of the premises in controversy in 1863, of Joseph Blake, and the other half of Dewey, in December, 1867, and that the purchase of the mortgage was in fact for Weston, and cancelled by his ownership of the title.

Upon this, we think the testimony shows very clearly, that the purchase was by complainant on his own account, and for his own benefit, and that Weston never had any interest in it. Neither do we think there is any foundation for the claim that complainant was a party to any scheme of deception, or that he recognized Weston as having any rights in the mortgage. And we do not think the preponderance of testimony indicates any fraud in Weston.

It is claimed that in 1876, Weston conveyed one of the most valuable parcels of nearly forty acres to Loren Day and Lafayette E. Taylor, and that he induced them to believe the mortgage was paid, and showed them the assignment with the securities, representing it to have been taken to complainant merely for convenience, and promising to get a discharge from the original mortgagee, Mr. Wood, also showing a letter from complainant in which he stated he held no such mortgage.

These statements are not consistent with each other, or with facts which cannot be said to be open to controversy. The sale, or conveyance, to Day and Taylor was made in April, 1876. Upon what took place at the purchase the witnesses are at variance, but Taylor in his testimony states in substance that no examination of title was made until after the purchase, and then he discovered the Wood mortgage, and that Weston promised to get a release of it as it had been paid. He also says Day had found out it had been assigned to Jakway, and Weston said he would write and get it released, and witness supposed he did. All this Weston denies. It appears that during that year Weston and his wife had sought, not as a right but as a favor, to get

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that parcel released, but complainant refused; and Weston distinctly informed him these parties bought subject to the mortgage. In September Taylor wrote him referring to the mortgage as in force, suggesting the propriety of having the assignment recorded, and representing the value of the mortgage as a first mortgage on the remaining property as a consideration why he should release this. This letter shows that none of the papers were then in Weston's hands, and that Taylor had not seen them, but knew what they were. Comparing all the testimony, which is somewhat mixed up, we have no doubt that Day and Taylor did not buy in any supposition that this mortgage had been paid, or that it belonged to Weston.

There is also some testimony from a detective who swears to admissions of payment made after this controversy had arisen. As the mortgage appears very clearly not to have been paid, and to have been treated as in force in the private dealings of Weston and complainant, we place no reliance on this testimony.

The only other person who claims to have taken title or security, relying on the non-existence of this mortgage, is Mrs. Noble, who took assignments of two subsequent mortgages given by Weston to Mr. Wood, covering a large amount of land in addition to these mortgaged premises,—the two mortgages being for $10,000 and $15,000, respectively. These mortgages were given to Mr. Wood, one in December, 1872, and one in January, 1873. He assigned them to Mrs. Noble in December, 1873. She was wife of one of the assignees of the former mortgage. Her testimony is, that she relied entirely on statements of Mr. Wood made to her at her home in the State of New York, that these were the only encumbrances. She did not rely on the records, and knew nothing of them. In her answer she says Wood told her this mortgage was paid, but in her testimony she denies having heard of its existence until long after.

Wood's testimony was not taken. But in his letters which were introduced, referring to the proposed assign-

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ments to Mrs. Noble, there are no such representations, and Mrs. Noble probably inferred more than was stated. There is every reason to regard her securities as adequate, without reference to this mortgage. Mr. Wood had been her business agent and had transacted loans for her, and it is not improbable that in the lapse of time, and from the fact that she had no discussion or doubts about the investment, she may now have wrong impressions. But it is not important, because Mr. Wood could not bind complainant by his representations, if he made any.

Upon the whole case we think complainant is entitled to enforce his mortgage. The assignment from Wood to H. & B. Noble was witnessed by the register and recorded at its date, and we have no right to assume it was not properly recorded. Mrs. Noble is the only defendant who makes any issue on the record of this assignment, and, as already suggested, she did not depend on the records or make any inquiry on the subject.

The record does not contain the means of determining in what order the lands should be sold, and a reference will be needed to ascertain this. Interest seems to have been paid to August, 1867, and a further amount of flour reckoned at $250 will bring it down to March 15, 1868, from which time interest is to be cast without compounding, at ten per cent. per annum.

The decree must be reversed with costs and a decree entered declaring complainant entitled to enforce the mortgage for $4000 with interest from March 15, 1868, at ten per cent. per annum, and referring it to a commissioner to report in what order sales shall be made. All the defendants who have appeared, to produce evidence of their claims before the commissioner; and on the coming in of his report, the usual decree of foreclosure to be granted.

The other Justices concurred.

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THE FIRST NATIONAL BANK OF ST. JOSEPH v. THE TOWNSHIP OF ST. JOSEPH.

Township taxes—Temporary secretary of township board—Presumption that officer had qualified—Warrant for collection—Valuation of property—Correction of assessments—Assessor's knowledge—Taxation of National Bank stock.

An extension of time granted by a township board for the collection of taxes is not invalidated by the fact that in the absence of the township clerk, a justice of the peace, summoned to act as a member of the board, was appointed to act as secretary.

Power to appoint a temporary secretary is incidental to corporate meetings; and if he has been entrusted with all the functions of the office his record and doings are valid, and they cannot be invalidated by any presumption that he was not sworn, especially if there was nothing requiring it to appear that he was sworn.

It cannot be presumed that a *de facto* official has neglected to make any necessary qualification.

A warrant for the collection of taxes is not fatally defective for being addressed to the treasurer of the township of ——, if it is properly signed by a supervisor of a specified township, and is annexed to its tax-roll.

An objection to the valuation of property as set down on a township tax-roll, on the ground that the figures indicating the amount are wrongly divided by a red line so that it is uncertain what it is, in dollars and cents, is not well taken where it is plain that no attention had been paid to the line, and that the amounts of taxes were all properly carried out between the right lines.

If a tax-payer does not have the assessment of his property corrected and perfected when it is in his power to do so, he must be assumed to admit its correctness.

A tax assessor cannot be presumed to have personal knowledge of the private affairs of persons assessed unless they choose to furnish it; as, of the amount of debts due by the holder of bank stock subject to taxation.

The power of the State to tax national bank stock is derived entirely from the Act of Congress permitting it, and the requirement of the act must be obeyed in good faith. The State tax law is to be construed in connection with the act, in assessing stock.

The Michigan tax law enumerates as taxable property all credits in excess of the debts of the persons taxed. Comp. Laws § 969. *Held*, that

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it is not necessarily in conflict with the provision of the Act of Congress that national bank stock shall not be taxed at a greater rate than other moneyed capital in the hands of individuals (Rev. St. U. S. § 5219) even though the latter are taxed for the full value of their bank stock without deducting their indebtedness.

Error to Berrien. Submitted June 29. Decided Oct. 5.

ASSUMPSIT. Defendant brings error. Affirmed.

N. A. Hamilton for plaintiff in error. An assessment roll is invalid if ambiguous: *Bird v. Perkins* 33 Mich. 28; *Cahoon v. Coe* 52 N. H. 518; *State v. Eureka &c. Company* 8 Nev. 15; national bank stock can only be taxed by the states where permitted by the national government: *McCulloch v. Maryland* 4 Wheat. 316; *Osborn v. Bank of United States* 9 Wheat. 738; *Weston v. Charleston* 2 Pet. 449; Cooley Const. Lim. 480, 485; shareholders in national banks cannot deduct their debts from the valuation of their shares: *People v. Dolan* 36 N. Y. 59; *People v. Weaver* 100 U. S. 539; *Pollard v. Zuber* 65 Ala. 629; *National Exchange Bank v. Hill* 22 Alb. L. J. 451.

Clapp & Fyfe for defendant in error. A State can tax shares held in a national bank: *Van Allen v. Assessors* 3 Wal. 573; *National Bank v. Commonwealth* 9 Wal. 354.

CAMPBELL, J. The township of St. Joseph sued the plaintiff in error for the tax due on shares of William E. Higman for the year 1880, and recovered judgment therefor, which now comes up on error. The tax is resisted partly for alleged insufficiencies in the proceedings, and partly because it is insisted the tax is invalid entirely.

It is claimed the tax collection was illegally extended. It appears that there was no township clerk, and that at a meeting of the board one Junius H. Hatch, a justice of the peace, being summoned to be present as a member, was appointed to act as clerk or secretary, and in that capacity made the entries and certified the proceedings of extension.

The township clerk is a member of the board, and when present acts as its clerk. Comp. L. § 710. But the law con-

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templates that circumstances may exist when he or any other member may be unable to act, or when one of the offices may be vacant. In such case one of the justices of the peace is to be called in, and the board thus constituted has all the powers of the statutory board. Comp. L. § 707.

If the clerk is not present, then some one else must necessarily act in that capacity; because otherwise the clerk might defeat the lawful action of the board by his resignation or absence. The power to appoint a temporary secretary is a necessary incident to corporate meetings, and his record and doings in that capacity must be held valid, if he has been entrusted with the functions, and cannot be invalidated by any presumption of his not being sworn. *Hutchinson v. Pratt* 11 Vt. 402. We have no statute which declares the acts of an officer *de facto* invalid for any such reason. And in *Sibley v. Smith* 2 Mich. 486, it was held that there could be no presumption that an oath required by law, was not taken by an officer, where there is nothing requiring it to appear. Whether we regard Hatch as a regularly appointed clerk to fill a vacancy under § 693 of the Compiled Laws, or as a merely temporary substitute for particular purposes, makes no difference in this regard. We cannot presume that he has failed to make any necessary qualification. The extension of time granted by the board was therefore valid and properly shown. There was positive proof of the book of records, and its authenticity cannot now be questioned.

It is also claimed that the warrant is defective, because not addressed to the treasurer of the township. The warrant is addressed to the treasurer of the township of ————. But it is signed by the supervisor of St. Joseph, and annexed to the tax-roll of that town. The roll, taken together, gives all the means of identification, and cannot be destroyed by this technical omission, which corrects itself.

Objection is also made that the valuation on the roll against this stock is to be regarded as $110 and not as $11,000. This claim is made because there is no dollar-mark opposite the figures 11,000, and they are written in

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such a way as to be divided by a red line supposed to indicate the division between dollars and cents.

But no one can look at this roll without seeing that the valuations are made up in even dollars, and that no attention was paid to the ruling. The amounts of taxes are all properly carried out and between the right lines. We do not think this objection well taken.

The principal objection to the tax is that no deduction was made, and it is claimed none is authorized to be made, from the value of the stock, for debts due by the owner, which it is insisted the act of Congress requires to be provided for, before our tax law can be maintained.

The act of Congress, under which the State gets power to levy this tax, declares that State taxation of national bank stock "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." Rev. St. § 5219. It is claimed that our tax law violates this rule by not allowing shareholders to deduct the amount of their debts from the value of their stock. And it is claimed that the decision in the case of *People of New York v. Weaver* 100 U. S. 539, is in point to dispose of this case.

We have no doubt of the duty of this State and all its authorities to carry out this rule to the fullest extent. The power to tax at all comes from the act of Congress, and it must be obeyed in thorough good faith. Our statute was passed for the express purpose of conforming to the law as existing in 1869, and as substantially re-enacted by the Revised Statutes of 1872. In our judgment the State law and the act of Congress must be read together, and the State officers must act in harmony with the latter. We think there is nothing to prevent this. While we do not ourselves discover any apparent inconsistency in the rule indicated by our statute, yet even if such inconsistency might appear from a strict interpretation of the language, we think that there can be no difficulty in avoiding it in practice if found—as we think it will not be—to result from a construction of a State law by itself. We do not feel called upon to discuss

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the statute at length, because the bank made no attempt to show that Mr. Higman was entitled to make any deduction.

It cannot be presumed that the assessor can have any personal knowledge of the private affairs of persons assessed, unless they choose to furnish it. The statutes provide fully for giving every tax-payer an opportunity to furnish a complete statement of his affairs, showing his property, debts and credits. Comp. L. §§ 980, 981, 982, 983, 984, 985. They also provide for a further opportunity to object to the correctness of the assessment, after it has been drawn up. § 986. If a person does not see fit to have his assessment corrected and perfected, when it is in his power to do so, it must be assumed that a failure to complain is equivalent to an admission of correctness. And this view is intimated in *Williams v. Weaver* 100 U. S. 547.

In the case of *People v. Weaver* the New York assessment was held bad because bank stock was assessed at its full value without reduction, when all other personal property was subject to reduction by debts. Under the taxing laws as before existing there was no exception, apparently, to the rule that if a man's debts exceeded his personalty he was not taxable at all, and was in any event only taxable for the excess over indebtedness. A law was then passed making bank stock taxable without deduction, but leaving other property on its old footing. The United States Supreme Court regarded this legislation as practically putting national banks, which constituted the principal body of banking corporations, at a disadvantage.

Our statutes have put all personal property on the same footing and taxed it equally. No deduction of debts is allowed from such property for taxing purposes, and private and corporate property are dealt with on terms of absolute equality. The only consideration given to debts at all is in reduction of credits. The statute declaring what shall be taxable, after enumerating taxable property of other kinds contains this clause making taxable "all moneys at interest, either within or without this State, due the person to be taxed more than he pays interest for, and all other debts due

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such persons more than their indebtedness." § 969. The remaining clauses relate to all of the ordinary varieties of property, tangible and intangible.

This is a very different case from that in New York. Credits are by no means universally taxed at all, and it could hardly be claimed that there is anything in the act of Congress which would prevent their complete exemption. In some States it has been held they do not come within the constitutional definitions of taxable property. They never can be dealt with to the same extent as other property, because of legal and practical difficulties in subjecting them to reach, or to jurisdiction. See Cooley on Taxation, 15, 65, 134, 270. We cannot perceive any conflict with the act of Congress in applying to national banks the same rules which we apply to all other personal property, merely because in taxing credits we tax the balances and not the whole credits. Our Legislature has put all capital on the same footing, and has made no invidious distinction between banks and other business.

While, therefore, it does not seem to us that any deduction can be required in this State from the value of bank stock, yet we also think that if it should be necessary in order to satisfy the act of Congress, the plaintiffs in error should have made their claim of reduction before the assessment was made absolute, as was done in *People v. Weaver*.

The judgment must be affirmed with costs.

The other Justices concurred.

LAUREN CARPENTER v. JOHN H. GRAHAM.

Assumpsit cannot be brought by mortgagee of chattels.

A mortgagee of chattels cannot recover in assumpsit for their value if they are converted.

Error to Berrien. Submitted June 29. Decided Oct. 5.

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ASSUMPSIT. Defendant brings error. Affirmed.

Clapp & Fyfe for plaintiff in error.

Potter & Potter for defendant in error.

MARSTON, C. J. I am wholly unable to discover any essential difference in the facts, as presented by the record in the present case, and as presented when here before, and reported in 42 Mich. 191, and any extended argument would be but a repetition of what was then said. This of course is unnecessary and uncalled for.

Upon the question as to whether the transaction was intended as a sale or a mere security or mortgage the court clearly and distinctly left that question to the jury, with instructions that if the latter, plaintiff could not recover.

In my opinion there was no error committed, and the judgment should be affirmed, with costs.

GRAVES and COOLEY, JJ. concurred.

CAMPBELL, J. I concur only on the ground that the case has been heretofore settled by a former decision.

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THE CHICAGO & NORTHEASTERN RAILWAY COMPANY v. GEORGE W. MILLER.

Railway companies—Injury to traveler on highway—Contributory negligence—Declaration for injury—Neglect to signal.

An old man, who was somewhat deaf, while driving a span of colts towards a railway track down a narrow road from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up, and tried to cross the track, and the rear of the buggy was struck by the locomotive. *Held*, that in an action for the resulting injury the question whether plaintiff was guilty of contributory negligence was for the jury.

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In a declaration for a railway injury, an averment that defendant negligently and carelessly drove a certain locomotive upon the railroad up to, upon and across a certain public highway at the crossing of the same and the said railroad, without giving the necessary statutory signals, viz.: ringing a bell or sounding a whistle, was a sufficiently specific averment of defendant's negligence when taken in connection with the averment of consequential injury, and it entitled plaintiff to support it by evidence, under defendant's plea to the general issue.

The neglect of a railroad company to ring a bell as required by statute when approaching a crossing will make it liable for any injury resulting from such neglect.

Error to Genesee. Submitted June 29. Decided Oct. 5.

CASE. Defendant brings error. Affirmed.

Newton & Howard, S. B. Gaskill and *E. W. Meddaugh* for plaintiff in error. A declaration for injury from defendant's negligence must aver in what respect it contributed to the injury: *Marq. Hought. & Ont. R. R. v. Marcott* 41 Mich. 433; *McKeon v. Lane* 1 Hall 319; *Howser v. Melcher* 40 Mich. 185; *Berry v. Stinson* 23 Me. 140; *Flint & Pere Marq. Ry. v. Stark* 38 Mich. 714; it is negligence for one who is approaching a dangerous railway crossing where the track cannot be seen nor the whistle heard, not to stop and listen before crossing: *Penn. R. R. v. Beale* 73 Penn. St. 505; *Grows v. Maine Cent. R. R.* 67 Me. 100; *Blaker v. Receivers of N. J. M. Ry.* 30 N. J. Eq. 240; *Lake Shore & Mich. Southern Ry. v. Miller* 25 Mich. 274; *Lake Shore, etc. Ry. v. Hart* 87 Ill. 529; *Havens v. Erie R. R.* 41 N. Y. 296; *Culhane v. N. Y. C. & H. R. R. R.* 60 N. Y. 133; *Cleveland etc. R. R. v. Elliott* 28 Ohio St. 340; even though the proper signals were not given by whistle and bell: *Wilcox v. R. W. & O. R. R.* 39 N. Y. 358; *Allyn v. B. & A. R. R.* 105 Mass. 77; *Baulec v. N. Y. & H. R. R.* 59 N. Y. 356: 21 Alb. L. J. 134; *Goldstein v. C. M. & St. P. Ry.* 46 Wis. 404; *Salter v. U. & B. R. R. R.* 75 N. Y. 273; and the question of contributory negligence is for the court: *Haas v. Chic. & N. W. R. R.* 41 Wis. 44; *Langhoff v. M. & R. D. C. R. R.* 23 Wis. 43; *Butterfield*

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v. Western R. R. 10 Allen 532; *Wilds v. H. R. R. R.* 24 N. Y. 430; *Baxter v. T. & B. R. R.* 41 N. Y. 502; *Bellefontaine R. R. v. Hunter* 33 Ind. 365; *N. Penn. R. R. v. Heileman* 49 Penn. St. 60; when the facts are agreed, the question of negligence is one of law: *K. P. R. R. v. Butts* 7 Kan. 308; *Burroughs v. Housatonic R. R.* 15 Conn. 124; *Rood v. N. Y. & E. R. R.* 18 Barb. 80; *Sheldon v. H. R. R. R.* 14 N. Y. 218; *Ryan v. N. Y. C. R. R.* 35 N. Y. 210; *Ill. Central R. R. v. Mills* 42 Ill. 407; *Lower v. Clement* 1 Casey 63; *Fernandes v. Sacramento R. R.* 52 Cal. 45; *Smith v. Bank* 99 Mass. 605; *Artz v. Chicago R. R.* 34 Ia. 153; for analogous cases, see *Kelly v. Hendrie* 26 Mich. 255; *Plaster v. Ill. R. R.* 35 Ia. 449; *Lewis v. Baltimore & O. R. R.* 38 Md. 588; *C. & A. R. R. v. Jacobs* 63 Ill. 178; *St. L. A. & T. H. R. R. v. Manly* 58 Ill. 300; *Maher v. A. & P. R. R.* 64 Mo. 267; *Donaldson v. M. & St. P. R. R.* 21 Minn. 293; *Brown v. M. & St. P. R. R.* 22 Minn. 165; *Moran v. Nashville &c. R. R.* 58 Tenn. 379.

Long & Gold and *A. C. Baldwin* for defendant in error. Where a person approaching a railroad track is put, by the railroad company's neglect to give signals, in a position where he has to choose promptly between two dangers, he cannot be held guilty of contributory negligence if he failed to choose well and is injured: *Twomley v. Railroad Co.* 69 N. Y. 158; *Voak v. Nor. Cen. R. R.* 75, id. 322; *Buel v. Railroad Co.* 31 N. Y. 314; *Wasmer v. Del. & West'n R. R.* 80 N. Y. 218; *Filer v. Railroad Co.* 49 N. Y. 47; where there is negligence on both sides the right to recover may still depend on the facts: *Rockford R. R. v. Delaney* 82 Ill. 198; *Richmond &c. R. R. v. Andrew* 31 Grat. 812: 31 Amer. Rep. 750; *Radley v. L. & N. W. Ry.* L. R. 1 App. Cas. 754; 15 Eng. Rep. 549; *Trow v. Vt. Central R. R.* 24 Vt. 487; *Penn. v. Sinclair* 62 Ind. 301: 30 Amer. Rep. 185.

MARSTON, C. J. Two principal questions have been presented on the argument in this case. The declaration it is

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said is defective in not averring specifically the negligence of the defendant which caused the injury. The declaration is that at a certain time and place the defendant negligently and carelessly drove a certain locomotive upon and along the railroad up to, upon and across a certain public highway, at the crossing of the same and the said railroad, without giving the necessary statutory signals, viz., ringing a bell or sounding a whistle. Here the specific act of negligence is pointed out, and evidence was introduced tending to sustain the averment. This averment with allegation of consequental injury, in our opinion, was sufficient, and entitled the plaintiff to introduce evidence, under the plea of the defendant, in support thereof. It was the duty of the company to at least ring a bell on approaching the highway where the injury was done, and a failure so to do would render it liable, in case any person was injured in consequence of such neglect.

It is next claimed that the facts as proven would not entitle the plaintiff to recover, because, under his own showing, he was guilty of contributory negligence.

It is conceded that the record shows but few disputed facts. If the testimony of the plaintiff, taken as a whole, fairly tended to make out a case in all its parts, then the court was right in submitting the same to the jury under proper instructions, even although the evidence on the part of the defendant may have been strong against a right to recover.

The plaintiff was a farmer, aged sixty-seven, and on the morning of July 11th started from his home, accompanied by his daughter, for Flint. He drove a spirited team of well-broken three-year-old colts, that had never been near or seen the cars. The highway as it approached the track had been cut down, leaving quite high embankments which prevented a view of the railroad track in the direction from which the locomotive approached. The plaintiff when about sixteen rods from the track stopped his team, listened and watched, and as he approached the track, the highway was narrow on account of the grade, a wagon loaded with

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gravel crossed the track, and the driver thereon spoke to the plaintiff, but owing in part to the latter being a little deaf, he did not hear what was said, but inferred from the motions made that a train was coming. The plaintiff could not then see the train; he spoke to his horses, and as they reached the track, or when within two rods of it, he saw the locomotive approaching about twelve rods distant. He said, "At the first glance I made up my mind I would get across that track and I swung my whip, and they (the horses) both jumped;" and while crossing the locomotive struck the hind wheels of his wagon causing the injury. The banks on the north side of the road were some twelve or fifteen feet high, and the following testimony will perhaps show as clearly as any other, the plaintiff's view of the situation at the time and why he took the course which he did.

Question. You may state to the jury why it was when you first saw the train you didn't hold your horses and let the train pass. *Answer.* It was under the impulse of the moment the whole thing was done; had I undertaken to have held them one chance out of a hundred they might have stood; they were a pair of three-year-old colts at the top of their mettle. *Q.* State why you didn't stop your horses? *A.* I was partly sure I would get under the cars if I undertook it; if the horses would whirl they could not whirl this way, (illustrating) against the bank, and if they whirled that way (illustrating) they would throw me on the track; if I was in the same position to-day I would do the same thing. * * * *Q.* Did you hear any bell rung or whistle sounded before you were struck? *A.* No, sir. *Q.* State what effort you made to hear it? *A.* I did the very best I knew how. *Q.* Where you listening for it? *A.* Yes, sir. *Q.* State what care you exercised in looking for the train before you reached the crossing? *A.* I took every care I could. *Q.* What did you do? *A.* I drove carefully, watching and leaning forward and looking; when I got pretty near there I saw the cars and then I made an effort to get across.

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On cross-examination he said that if his team had been steady and not afraid, so that he could have controlled them in such a place, he would have stopped and not attempted to cross on first discovering the cars. *Question.* The only object you had in crossing was because you thought you could not control the horses when the engine passed? *Answer.* It was because I was afraid the horses would throw me on the track. *Q.* The only reason why you undertook to cross before the engine did, was because you were fearful you could not control the colts and hold them while the engine went up the track? *A.* Yes, sir. *Q.* That is one reason? *A.* Yes, sir. *Q.* Before you raised the whip to increase the motion of your horses you saw the engine approaching? *A.* Yes, sir. *Q.* You thought by applying the whip to the colts that you could get across the track before the engine got to you? *A.* Certainly. *Q.* That is what you calculated on? *A.* Yes sir.

There was another road the plaintiff could have taken, and avoided this particular crossing, by going about a mile further; but this was the road usually taken by him, and was a public highway used as such.

The fact that the plaintiff was driving a span of colts, or that he took this road instead of another and perhaps safer one, would not be such contributory negligence on his part as to prevent a recovery. His right to drive young horses and to travel on any public thoroughfare cannot thus be abridged. We do not say that there may not be cases, where the character of the team, and the road taken, in preference to another equally convenient or nearly so, and safer, might not be taken into consideration by a jury with the other facts in the case, as tending to show a want of ordinary care. It must however be a very strong state of facts indeed, that would justify a court in taking the case from the jury. The matter should not be in doubt, and we are not prepared to say that men of ordinary care, prudence and intelligence would have considered it dangerous to have taken the road in question with a team like the one driven by the plaintiff. From his testimony it does not appear

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that he did not exercise due care and caution in approaching the crossing, and it is only when he gets within a few feet of the railroad track and sees a train approaching and close at hand, that he can be charged with negligence in attempting to cross the track. This was the first warning or knowledge that he had that a train of cars was near, and with a high embankment on one side, and the apparent danger in attempting to turn in an opposite direction; without time for reflection or to deliberate and calculate or measure distances he had to determine his course and instaneously make the attempt. That he was in a dangerous position, whether he stood still, attempted to turn or to cross the track cannot be doubted; and of this he seems to have been well aware. The preservation of his life and property, we may well assume, would lead him to take what he then considered the safest course, in view of the facts and surrounding circumstances then apparent to him. A stricter rule should not be held here than in criminal cases, where the right of one in apparent danger to act upon circumstances as they appear to him at the time is well settled, and although subsequent investigation may show that he erred, yet that alone will not make him criminally responsible. If the neglect of the company to sound a whistle when approaching the highway, permitted the plaintiff to drive into a dangerous position, under circumstances which allowed him no time for calm reflection, and he, acting upon the spur of the moment, in his efforts to avoid the danger, made a mistake, and took what subsequent cool deliberate investigation may show to have been wrong, and that some other course would have been better if not absolutely safe, yet he cannot be charged with contributory negligence because of such error of judgment under such dangerous circumstances. This is the rule in both civil and criminal cases, sustained by an abundance of authority if any indeed were needed. This case was, therefore, very properly submitted to the jury upon the facts.

We do not understand any serious objection made to the charge of the court, touching the right of the plaintiff to

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recover, in case the jury found him to have been guilty of negligence, and a careful examination of the instructions given shows that no complaint could well be made thereto. The court repeatedly told the jury that the plaintiff could not recover if he was negligent—so full and explicit were the instructions upon this subject that we need not quote at length therefrom.

In our opinion no error was committed and the judgment must be affirmed with costs.

The other Justices concurred.

LAURA A. STOREY v. ALLEN C. DUTTON ET AL.

Rights of mortgagers under paid-up lease given as additional security—Permission to hold over—Application of rental on mortgage debt.

Where a paid-up lease for a certain period was given to mortgagees as additional security, and the mortgagees had the option to hold over on paying a fair rental, the foreclosure of the mortgage would not prevent them from resorting to any additional security they might have, and they would have a right to apply the amount of rent due from them and unpaid, in satisfaction of their debt; and if the mortgager should assign his claim for rent to a third person, the latter would have no better right than his assignor and could not recover it until the foreclosure decree is extinguished.

Error to Eaton. Submitted June 29. Decided Oct. 5

ASSUMPSIT. Plaintiff brings error. Affirmed.

Crane & Dodge and *M. V. Montgomery* for plaintiff in error.

Corbin & Cobb for defendant in error.

MARSTON, C. J. The facts upon which this case arises are set forth in *Dutton v. Merritt* 41 Mich. 537. The plaintiff in this case seeks, as assignee of Merritt's interest in the lease referred to, the rental value of the premises

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not already credited upon the mortgage foreclosure decree. The fact that defendants have occupied the premises, and that they must pay a fair rental therefor, is not questioned, but they claim the right to apply the rent upon the amount still due them upon the decree.

The fact that these defendants foreclosed the mortgage given them would not deprive them of the right to resort to any other security they held in order to obtain full satisfaction of the debt; and the mortgagor could not deprive them of this right by assigning the due and unpaid rent to a third person. The latter could acquire no better right than that of his assignor, who could not have sued for and recovered the rent in this case. While the defendants remain in possession the fair rental value of the premises must be applied in reduction of the decree until the extinguishment thereof, and until the happening of that event, an action will not lie to recover rent which may be due and uncredited.

It follows that the judgment must be affirmed with costs.

The other Justices concurred.

Charles A. Corey v. William Alderman and James Nickerson.

Priority of mortgage—Fraud upon mortgagee.

A mortgager and his grantee conspired to cheat the mortgagee thus: The grantee quitclaimed to him in satisfaction of his foreclosure decree and the mortgager then recorded a later mortgage from the grantee to himself before the quitclaim deed could be recorded. *Held*, that the later mortgage should be set aside and the quitclaim deed permitted to stand.

Appeal from Ionia. Submitted June 20. Decided Oct. 5.

Bill to set aside the discharge of mortgage. Defendants appeal. Affirmed.

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Mitchel & Pratt for complainant. Equity will revive or suppress an incumbrance as may be just: *Forbes v. Moffat* 18 Ves. 384; *Starr v. Ellis* 6 Johns. Ch. 393; *Barnes v. Camack* 1 Barb. 396; *Bruse v. Nelson* 35 Iowa 357; Story's Eq. Jur. § 110, n 1; 2 Jones Mort. § 971.

Wells & Morse for defendants.

CAMPBELL, J. Complainant having a purchase-money mortgage on lands in Ionia county conveyed to Nickerson in 1867, and having no personal obligation secured by it, proceeded in chancery to foreclose, and obtained a decree in March, 1879, for $4716.51. He had begun to advertise, when Nickerson proposed to reconvey the property in satisfaction of the decree. This reconveyance was made by quit-claim deed on the 15th of May, 1880, too late for record on that day. On the same day, a little while before this deed was delivered, the defendant Alderman put on record a mortgage from Nickerson for the sum of $1800. Corey executed a discharge of his mortgage at the time when the deed was made.

Corey now files his bill to set aside this discharge and have his decree and mortgage reinstated, in preference to the Alderman mortgage. He claims that this latter was executed and recorded fraudulently, in order to cheat him out of his claim, by conspiracy between Alderman and Nickerson. The circuit court gave the relief prayed, and defendants appeal.

The facts in the case make it clear that either complainant was trying to get a conveyance recorded first in order to defeat Alderman's mortgage, or that the latter was trying to defraud complainant. The land is not worth enough to pay complainant in full.

We have no doubt the decree below was founded on the true state of facts. It appears that complainant, immediately before exchanging papers, had carefully examined the records, and there is no possible motive which can be supported by the evidence, for his running any risks whatever as to priority. In the conflict of testimony we think his

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version is correct, and that the defendants got up the Alderman mortgage and procured its registry for the purpose of destroying his priority of title. It would be of little use, on a mere question of fact, to enlarge upon the details. We are satisfied of the fraud.

The court below might properly have set aside the Alderman mortgage and allowed the deed to stand. Complainant ought not to have been put to the expense of further advertising and sale. As he has not appealed the decree will have to be affirmed as it stands, with costs of both courts and $75 damages for delay.

The other Justices concurred.

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URIAH UPJOHN v. THE BOARD OF HEALTH OF THE TOWNSHIP OF RICHLAND ET AL.

Powers of township boards of health—Injunction against location of burying ground—Pollution of water.

The court of chancery has an undoubted jurisdiction to enjoin the action of township boards of health in establishing burial places, should they proceed to exercise it illegally or improperly to the injury of others.

But these boards have large discretionary powers, the exercise of which will not be interfered with until a clear case is made out. It must be intended until the contrary is shown that they are acting in good faith and in the line of their duty.

Complainant sought to enjoin the location of a burying ground near his residence, for the reason, among others, that it would destroy his well. *Held*, to be a strong circumstance against his application that he had voluntarily bought and located his residence in the immediate vicinity of a burying ground which defendants were merely proposing to enlarge without bringing it nearer.

And it appearing further that complainant's barn yard was nearer the well and more likely to injure it than the burying ground, *held*, that an injunction should be denied.

Quære whether there can be any legal ground for complaint for the pollution of subterranean waters when it is caused by a proper use, without negligence, of adjacent premises.

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If there can be any such ground of complaint it can only be when the injury is of a very positive and substantial character.

Appeal from Kalamazoo. Submitted June 30. Decided October 5.

Bill of injunction. Complainant appeals. Dismissal affirmed.

George M. Buck for complainant. Injunction lies to restrain public officers in the exercise of a supposed duty to the injury of private rights: *Cooper v. Alden* Har. Ch. 72; *Mohawk etc. R. R. v. Artcher* 6 Paige 83; *Darby v. Wright* 3 Blatchf. 170; *Terrett v. Sharon* 34 Conn. 105; *Com. v. Colley* 29 Penn. St. 121; *Baltimore v. Porter* 18 Md. 284; regularly organized bodies named by statute, may be sued, though not corporations by these names: *Johr v. Supervisors* 38 Mich. 532; *Board of Health v. East Saginaw* 45 Mich. 257.

Edwin M. Irish and *Dallas Boudeman* for defendants. One who has bought his premises with knowledge of a neighboring nuisance cannot afterwards enjoin it: *Gilbert v. Showerman* 23 Mich. 448; one who buys a lot adjacent to land dedicated to public use takes it subject to the inconveniences attendant thereto: *Morrison v. Hinkson* 87 Ill. 587; injunctions against cemeteries were denied in *Ellison v. Commissioners* 5 Jones N. C. Eq. 57; see also *Greencastle v. Hazelett* 23 Ind. 186; *Lakeview v. Letz* 44 Ill. 81; an injunction will not be granted to restrain an act which does not affect, for secondary purposes, water which has become useless for primary purposes: Wood on Nuisances 708 n. 3; *Dunn v. Hamilton* 2 S. & Mc.L 356; an injunction will not be granted against an injury that is not *per se* a nuisance and which may or may not become so: High on Inj. § 488; nor to restrain the use of a cemetery on the ground of injury to subterranean currents: *Chatfield v. Wilson* 28 Vt. 49; *Harwood v. Benton* 32 Vt. 737; *Frazier v. Brown* 12 Ohio St. 294; Washb. Easements 363; nor because it affects the market value of adjoining property:

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New Orleans v. St. Louis Church 11 La. Ann. 244; *Musgrove v. St. Louis Church* 10 La. Ann. 431.

Cooley, J. This suit is instituted to restrain the township board of health of the township of Richland in the county of Kalamazoo from locating a burial place for the dead in the immediate vicinity of the dwelling house of the complainant in the incorporated village of Richland in said township. The grounds of equitable jurisdiction which are assigned in the bill are, that the use of the proposed site for burial purposes will be detrimental to the health of the people of the village; that it will corrupt the water of their wells and render it unfit for use, and for these reasons become a public nuisance; and that it will also be specially injurious to complainant whose dwelling and well are near it. The defense to the suit is based on several distinct grounds, one of which is that the authority to establish burial places is confided in this State exclusively to the boards of health, and is a discretionary authority which cannot be controlled and overruled by the courts.

There is no doubt that under the statutes boards of health have large discretionary powers in providing for the interment of the dead. It is made the duty of the township board for each township to purchase therein so much land for burying grounds as shall be necessary for burying the dead of such township, provided suitable grounds can be procured in the township for the purpose, and if not, then in an adjoining township. They are also to make all regulations which they may deem necessary for the interment of the dead, and respecting burying grounds for their township. Comp. L. § 1696. These powers they must exercise according to their own judgment; and no appeal is provided for, whereby their action can be reviewed by any superior authority empowered to substitute its judgment for theirs. But if discretion is abused or their judgment improperly exercised, there is no doubt of the right of the judiciary to restrain the abuse. A superintending authority over all inferior tribunals is expressly conferred upon the

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circuit courts by the Constitution—art. vi, § 8—and this will be exercised not only to keep them within their jurisdiction, but also to restrain any oppressive exercise of powers whereby the rights of the public or of individual citizens will be invaded. As is said in *Cooper v. Alden* Har. Ch. 72, 91, the court of chancery "has undoubted jurisdiction to interfere, by injunction, where public officers are proceeding illegally or improperly, under a claim of right to do any act to the injury of the rights of others;" and it has been exercised in many cases, under a great variety of circumstances, and against State officers as well as those of inferior grade. *Palmer v. Rich* 12 Mich. 414; *Ryan v. Brown* 18 Mich. 196; *Kinyon v. Duchene* 21 Mich. 498; *Merrill v. Humphrey* 24 Mich. 170; *Clement v. Everest* 29 Mich. 19; *Bristol v. Johnson* 34 Mich. 123; *Marquette etc. R. R. Co. v. Marquette* 35 Mich. 504; *Flint etc. Ry. Co. v. Auditor General* 41 Mich. 635; *Folkerts v. Power* 42 Mich. 283.

But while it is undoubted that the court has jurisdiction, it is equally clear that the jurisdiction should only be exercised when a plain case has been made out. Defendants are acting officially, upon a subject which by law and the choice of their fellow-citizens has been committed to their charge, and it must be intended that they are acting in good faith until the contrary appears. The ordinary presumption is that officers perform their duty; and this will support the action of boards as well as of officers acting singly. *Lacey v. Davis* 4 Mich. 140; *Thayer v. McGee* 20 Mich. 195; *Stockle v. Silsbee* 41 Mich. 615. The principle is forcibly stated in *Cooper v. Williams* 4 Ohio 253: "Although a case strong enough to justify our interposition may arise from corruption, from malicious intention, or caprice, yet, in the absence of these, the court would pause, before it will assume to control the discretionary powers the law intends to confide to them. The security, for the faithful exercise of this discretion, is found, not in the superintendence of courts of justice, but in the individual reputations of the commissioners, in the tenure of their office, in their acting openly on the rights of others, in the face of a people,

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vigilant to watch and acute to discern, and in their being exposed to the overwhelming force of public opinion."

Has the clear case, required by this principle, been made out by this complainant? The defendants insist that it has not. They deny that the evidence shows the proposed burying ground will be any nuisance whatever, either public or private. They say further that if it can be an inconvenience or annoyance to complainant he is precluded from complaining of it, for the reason that it is to be merely an addition to or extension of an existing cemetery by the side of which the complainant purchased and located his residence many years since, thereby voluntarily assuming all the natural and inevitable consequences of being near it, and that his well, which he fears is to be ruined by it, is in no danger beyond that to which he has voluntarily exposed it, and which, in fact, has already rendered it unfit for use. Such in brief is the issue which is made by the answer.

The evidence is voluminous, but there is less conflict than is usually encountered in such cases. The village of Richland appears to be a small hamlet, containing less than three hundred people, situated in a level country of prairie formation, and with its population on or near a highway running through it east and west. Another highway called Park street crosses this at right angles, leaving most of the population to the west. Some sixty rods east of the crossing was located the old burial ground mentioned in the answer, and this has been used many years until it is nearly filled with graves. It is admitted that while this ground was thus being used the complainant purchased the farm adjoining it on the east, his residence being twenty rods or so beyond the east boundary of the burying ground; and this is where he now resides. No other residence is so near the grounds except one on the opposite side of the highway about the same distance to the west. The grounds which the board of health have now procured for cemetery purposes are directly across the highway from the old grounds, but not extending so far east by two rods, and this, as well as the fact that they are on the other side of the highway, places

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them a little further from complainant's residence. At first blush, therefore, there does not seem to be a very strong equity in complainant's case. The nuisance he complains of he has voluntarily made his neighbor, and if the proposed action of the defendants is likely to add to the annoyance, the addition is one he might well have anticipated when he moved into the vicinity. The grounds then in use must in time require enlargement, and the natural enlargement to look for would be the purchase of adjoining grounds. In *Gilbert v. Showerman* 23 Mich. 448, 456, where an offensive business was complained of under similar circumstances, we expressed the opinion that "the complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner." Much of what is said in *Robinson v. Baugh* 31 Mich. 290, is also applicable to the facts of this case. And it is proper to mention as a significant fact that the complainant, though he assumes to speak for the public, comes alone to make this complaint. Others ought to be equally solicitous for redress if the neighborhood is likely to be rendered uninhabitable, by the action complained of.

But the evidence leaves us in no doubt that, as concerns the health of the neighborhood, the fears of injury on the part of complainant are groundless. Many experts were examined on both sides, including Professors Langley and Vaughan of the State university, Professor Kedzie of the State agricultural college, and a number of the leading physicians of the State, and the general result of their evidence is, that the proposed occupation of the grounds will not be likely to affect sensibly the atmosphere of the vicinity so as to render it unhealthy. They generally agree that the deleterious influence, if any, is to be traced underground, and perceived in the water of wells; and this will be a private nuisance only, to be complained of by the owner of a well affected, as a peculiar grievance to him. There is then

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no public nuisance, and the question is whether there is a private nuisance in the threatened injury to complainant's well.

We think the evidence tends to show that the occupation of the new grounds for burial purposes will be likely to affect to some extent any well that is or may be located in its vicinity, and particularly that it will be likely to affect the well of complainant. The evidence leads to the conclusion that the sub-surface waters from the burial grounds now in use find their way to the east, and that complainant's well is more likely to be affected by the use of the new grounds than is any other. If, therefore, his case were unembarrassed by the previous existence of a burying ground adjoining him, there would be some reason in complainant's protest even if there were not, in a strict legal sense, an equity. But he is further embarrassed by the fact, which is very clearly brought out in the testimony, that his barn-yard is nearer to his well than the burying ground, and much more likely to corrupt its waters. Indeed there seems to be little doubt that they are corrupted by it already; not, perhaps, to an extent appreciable without chemical tests, but sufficient to make it evident to experts that the danger complainant professes to fear is nearer at hand than the cause to which he directs the attention of the court. At most the proposed use of the new grounds will only be a third cause of corruption to the well, in addition to two others which complainant voluntarily takes the risk of; and it is probably the least likely of the three to bring sensible harm.

It has been decided in several cases that the percolation of filthy matter from the premises of the party who suffers it through the soil upon the premises of an adjacent owner to the injury of the latter is an actionable nuisance. *Tenant v. Goldwin* 1 Salk. 360; *Tate v. Parrish* 7 T. B. Monr. 325; *Columbus Gas Co. v. Freeland* 12 Ohio N. S. 392; *Marshall v. Cohen* 44 Ga. 489; *Pottstown Gas Co. v. Murphy* 39 Penn St. 257; *Greene v. Nunnemacher* 36 Wis. 50. And it has been said that the liability does not depend upon negligence, but that the reasonable precaution which

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the law requires is effectually to exclude the filth from the neighbor's land. *Ball v. Nye* 99 Mass. 582; *Hodgkinson v. Ennor* 4 Best & S. 229. But all the cases in which this doctrine has been applied were cases in which, consistent with the proper use of the premises, the exclusion was practicable; and none of them goes to the extent contended for here. All of them agree that the injury must be positive and substantial, and such as fairly imposes upon the party causing it the duty of restraint. *Columbus Gas Co. v. Freeland* 12 Ohio N. S. 392, 400.

The movements of sub-surface waters are commonly so obscure that rights in or respecting them cannot well be preserved. They do not often have a well-defined channel, and it is not easy in many cases to determine in what direction their movements tend. If corrupted at one point the effect may be confined within very narrow limits, while at another, though no surface indications would lead one to expect it, the taint might follow the water for miles. In some cases a new well at a considerable distance from an old one may withdraw the water from the other and destroy it, while in other cases, in which the same result would seem more likely, there is no perceptible influence. It is in view of these difficulties that the rule of law has become established that owners of the soil have no rights in sub-surface waters not running in well-defined channels, as against their neighbors who may withdraw them by wells or other excavations. *Acton v. Blundell* 12 M. & W. 324; *Greenleaf v. Francis* 18 Pick. 117; *Roath v. Driscoll* 20 Conn. 533; *Chatfield v. Wilson* 28 Vt. 49; *Wheatley v. Baugh* 25 Penn. St. 528; *Bliss v. Greeley* 45 N. Y. 671; *Chase v. Silverstone* 62 Me. 175; *Frazier v. Brown* 12 Ohio St. 294; *New Albany etc. R. R. Co. v. Peterson* 14 Ind. 112. But if withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure, and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind

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and degree in the two cases. If the complainant may lawfully demand the relief he prays for in this case, we do not see why the same relief may not be demandable in a great variety of cases where the private grounds of individuals in such little hamlets are being used for the most common and necessary purposes. A privy vault, for example, will probably corrupt the sub-surface water to a greater extent than several graves; and if the one may not exist in the vicinity of private dwellings, neither may the other. And if a burial ground is an actionable nuisance to a person living within twenty or thirty rods, under the facts as they are presented in this case, it may be an actionable nuisance under other circumstances to one living a mile away. What would be necessary to support the action would be, to trace, by the application of chemical tests to the sub-surface waters, the corrupting influence of the grave for that distance.

It is possible that in this case the board of health might have located the new burying grounds more wisely and more considerately; but we do not think their action is successfully assailed. They are not shown to have acted fraudulently or through caprice, or to have exceeded in any respect their jurisdiction. If complainant is injured by their action, the injury is incidental to the exercise of a lawful right, and can therefore give no ground for an action. *Pontiac v. Carter* 32 Mich. 164. The State has conferred upon the defendants the power they have exercised, and left the exercise to their judgment. They have acted according to their judgment, and the action is conclusive. *Attorney General v. Burrell* 31 Mich. 25.

The decree dismissing the bill must be affirmed with costs.

The other Justices concurred.

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Miner Hedges v. Wellington Hibbard, John A. Covode et al.

Exceptions cannot rest on general findings or on deductions.

No question for review arises upon a record brought up as a case made and containing only a statement of the facts found by the court, and the judgment thereon.

No exception can be taken to a judgment upon a general finding of facts made by the court, where no special findings were asked for or made.

Mere deductions from the evidence, made after judgment as a basis for review, are not part of the record and can not be brought up on error.

Case made from Kent. Submitted June 30. Decided October 5.

Assumpsit. Defendants had judgment. Affirmed.

Taggart & Wolcott for plaintiff.

Simonds & Fletcher, John Patton, Jr. and *Taggart, Stone & Earle* for defendant.

Graves, J. This record is brought up as a case made after judgment, but it raises no question. It sets up the pleadings and informs us that the cause was tried by the court without a jury and that on the "trial the following facts were proven," and after reciting them it proceeds to say, that "upon the foregoing facts the said cause was submitted to the court, whereupon afterwards, and on the 21st day of December, A. D. 1880, the said court rendered judgment against the said plaintiff and in favor of the said defendants for their costs to be taxed and the said plaintiff did then file his written exception to the said judgment."

No special findings of any kind were asked for or made. The cause was tried before the judge on general evidence and he decided in accordance with his view of that evidence

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in the same manner in which a jury would have decided by general verdict, and his general conclusion on the effect of the evidence was followed by the only judgment which could be given on it. There was no more occasion for an exception than there would have been in case a jury had returned a general verdict for the defendants.

The matters stated in the record as being the "facts proven" are deductions made from the evidence since the judgment, for the purpose of constructing a case for review in this court. They were not constituents of the record when the judgment was given and a writ of error would not have brought them up, and it would be extravagant to suppose they could be reviewed as though they were the foundation of the judgment. The provisions for deciding cases on agreed facts have no application: Comp. L. §§ 4947, 6191, and of course the proceeding has no relation to the case where the question is whether there is any evidence on some specified point. The practice has been misconceived. *Chatterton v. Parrott*, at the last June term, *ante* p. 432, is exactly parallel. The irregularity is doubtless of small consequence because no foundation is discovered in what are represented as the "facts proven" for any different judgment.

The judgment is affirmed with costs.

The other Justices concurred.

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JAMES ATKINS v. WILLIAM BORSTLER ET AL.

Venue of transitory action against non-resident.

Transitory actions upon contracts can be brought against non-residents of the State in any county where service can be obtained upon them.

The Constitution gives jurisdiction to the circuit courts over transitory actions upon contracts, against non-residents of the State; and this jurisdiction cannot be taken away by any legislation limiting the forum of the action to the county in which the plaintiff resides.

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The statute (Comp. Laws § 5970) in requiring transitory actions to be tried in the county where one of the parties shall reside at the time of bringing suit, is meant to save resident defendants from vexatious suits in places remote from their homes, and not to protect non-residents of the State from being sued at all if they cannot be found in the plaintiff's county.

Error to Kent. Submitted June 30. Decided Oct. 5.

Assumpsit. Plaintiff brings error. Reversed.

Hughes, O'Brien & Smiley for plaintiff in error. In New York there is a provision like that of Comp. L. § 5970 (*Smith v. Bull* 17 Wend. 323) under which jurisdiction was given though both parties were non-residents: *Gardner v. Thomas* 14 Johns. 134; *Johnson v. Dalton* 1 Cow. 543.

Champlin & More for defendants in error. In Michigan all suits with certain exceptions must be brought where one or the other of the parties reside: *Det. F. & M. Ins. Co. v. Saginaw Circuit Judge* 23 Mich. 492.

Campbell, J. Plaintiff who resides in Mecosta county, sued defendants, who reside in another State, on contract, the suit being brought in Kent county and service made there. Defendants pleaded in abatement showing their non-residence and that of plaintiff, and claiming that under our statutes they could only be sued in Mecosta. On demurrer this plea was sustained, and plaintiff brings error.

It was held in *Haywood v. Johnson* 41 Mich. 598, that a resident of the State could not be sued in a transitory action in a county where neither party resided. It was held in *Turrill v. Walker* 4 Mich. 177, that the circuit courts could get no jurisdiction unless one defendant is served in the county. It results from these decisions that a suit in Mecosta would have been fruitless unless a defendant should be found there, and that unless a suit can be brought where a non-resident defendant is found, he cannot be sued at all, in many cases, and could not have been in this case.

Reliance is had by defendants on section 5970 of the Compiled Laws of 1871, which requires transitory actions to be

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tried in the county "where one of the parties shall reside at the time of commencing such action." This was held in *Haywood v. Johnson*, to require suits to be commenced in such county. And if the section applies to non-residents of the State, the decision below was correct. But if correct it follows that there are many transitory actions on contract, as well as in tort, where such persons can always evade the justice of this State by keeping away from counties where their creditors reside. The Constitution gives jurisdiction without any exception, in such cases, to the circuit courts. It would not be competent for the Legislature to take it away. And if the statute in question would have any such effect according to its ordinary meaning we are compelled to choose between holding it to that extent void, or construing it according to what was no doubt its real intent, as not applicable here.

We have no doubt the section in question was intended to be a beneficial section in the direction of saving defendants from vexatious suits in places remote from their homes. It accordingly saved them the privilege of being sued at home, or in the home county of the plaintiff, who was regarded as entitled also to some consideration. It is evident that in so legislating the law-makers had no idea of granting a privilege to non-residents against being sued at all. The natural inference is that those who were entitled to be sued in the forum of their residence, are persons whose residence contains one of the courts of the State; so that suits may be brought under our laws. (The language of the statute only applies to trials of actions brought under our laws; and if any case arises under our laws it would be absurd to hold that the Legislature meant to say it should not be tried at all. Those who claim the privilege must point out a Michigan forum where they can be found for service of process. The statute applies to no others.)

This has been the uniform practical construction, and this is the first case brought to our notice, in which any non-resident defendant has claimed exemption from process. This practical construction of nearly forty years cannot be

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disregarded. We think that the case is not within the statute, and that service on the defendants in any county of this State is valid when suit was commenced in that county.

Judgment must be reversed with costs of both courts and the demurrer sustained, with leave to defendants to answer over and plead issuably in twenty days.

The other Justices concurred.

CHARLES J. BURNHAM v. THE TOWNSHIP OF BYRON.

Liability of township for injury from defect in highway

A township under the statute of 1879 (General Laws, p. 223) is liable to a party who is injured by reason of a defect in a public highway along which he is passing.

Error to Kent. Submitted June 30. Decided Oct. 5.

CASE. Plaintiff brings error. Reversed.

Burlingame & Rogers for plaintiff in error.

Hughes, O'Brien & Smiley for defendant in error.

COOLEY, J. The plaintiff in this case seeks to recover of the township for an injury sustained by him in consequence of a bridge on one of its public highways being out of repair when he was lawfully passing over the same. The allegation of injury is that being traveling and passing along said highway on horseback, and in the act of passing across the bridge in a careful and prudent manner, the plaintiff's horse, without any fault of the plaintiff, became entangled in loose planks of the bridge, and thereby tripped, stumbled, and became frightened and unmanageable, and threw the plaintiff violently to the ground, etc. The duty of the township to keep the bridge in repair is averred, and also that it had notice of the want of repair, and reasonable time

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and opportunity to repair it, but that it neglected to do so. Also that the highway had been ten years in use. A plea of the general issue was interposed, but on the trial the defendant objected to any evidence on the part of the plaintiff, on the ground that the declaration disclosed no cause of action, and the court sustained the objection. The case comes up on writ of error after judgment for defendant.

It was held in *Commissioners of Highways v. Martin* 4 Mich. 557, that in this State townships were not liable at common law for injuries occasioned by neglect to keep highways in repair, and also that no existing statute had imposed the duty. The ground of the decision was that the duty to keep the highways in repair was not a township duty, but one which the statute had imposed upon certain highway officers. In 1861 the Legislature with a view, perhaps, to change this rule passed an act, the first section of which declared "that any person or persons sustaining bodily injury upon any of the public highways in this State, by reason of neglect to keep in repair any bridge or culvert by any township or corporation whose duty it is to keep such bridge or culvert in repair, such township or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction." The second section extended the remedy to the cases of injury to horses and other property, and made provision for the levy of taxes to pay judgments against townships. Comp. L. §§ 1323, 1324.

In *Leoni v. Taylor* 20 Mich. 148, the act of 1861 was held to be ineffectual so far as townships were concerned, for the reason that as yet no statute had imposed upon townships the duty to keep in repair the highways, bridges and culverts. That duty remained as it was before, the duty of certain highway officers, and not a township duty. The attention of the Legislature was again called to the subject in 1879, and a statute more careful and particular in its provisions was enacted. The first section provides, "That any

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person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect to keep such public highways or streets, and all bridges, cross-walks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, cross-walk or culvert, and whose duty it is to keep the same in good repair, such township, village, city or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction." The second section extends the right of action to the case of injury to animals or other property; the third makes provision for the payment of judgments; and the fourth declares "It is hereby made the duty of townships, villages, cities or corporations to keep in good repair, so that they shall be safe and convenient for public travel at all times, all public highways, streets, bridges, cross-walks, and culverts that are within their jurisdiction and under their care and control, and which are open to public travel." Also that "Highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, cross-walks or culverts, and the care or repairs thereof, are hereby made and declared to be officers of the township, village, city, or corporation wherein they are elected or appointed, and shall be subject to the general direction of such township, village, city, or corporate authorities, in the discharge of their several duties." The fifth section apparently limits the remedy to cases of injuries on highways which have been in use for ten years. General Laws 1879, pp. 223, 224.

It is said on behalf of the defendant that notwithstanding these broad provisions the duty in townships to keep highways in repair is not a township duty, but still remains as it was before, the duty of the highway commissioners. Indeed this fact is recognized and declared by the same Legislature which passed the act last mentioned—see General Laws 1879,

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p. 111—and it must be admitted that highway commissioners are constitutional officers—Const. art. 11, § 1—and that no provision has been made by law whereby these officers can be made subject to the general direction of the township, as this statute seems to contemplate.

There can be no question, however, of the power of the Legislature to make the municipalities liable for such injuries, independent of any question where the duty to keep in repair is located, or upon whom it is imposed. The question is one of policy, not of power. And directing our attention to this act of 1879, the question resolves itself into this: Has the Legislature by this act clearly evinced its intent that the townships shall be liable? On this question we think there is no room for reasonable doubt. The duty of the township to keep its public ways in repair is declared in plain and positive terms for the very purpose of covering the defect in the previous legislation. In effect the fourth section of the act declares that the neglect of the highway officers shall be imputed to the corporation by whose people they are chosen and within whose limits they exercise their authority.

It follows that the judgment must be reversed, with costs, and the case remanded for trial.

The other Justices concurred.

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Isaac E. Messmore v. John Huggard and Francis Huggard.

Purchase of mortgaged lands by judgment creditor at execution sale only covers equity of redemption—Intention to contest mortgage should be made known to other bidders.

Complainant having a judgment against A. caused execution to be levied on lands and a sale made at which he became the purchaser. The land was duly conveyed to him in pursuance of this sale after time for redemption had expired. He then filed his bill in equity against A. & B., alleging that previous to his levy A. had given to B. a

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mortgage on the lands for a considerable sum, fraudulently and without consideration, and in order to defeat complainant in the collection of his judgment, and he prayed a decree setting it aside as a cloud on his title. From the evidence it appeared that complainant knew of the existence of the mortgage when he made his levy, but that when sale was made there was no notification of any intent to contest the mortgage, and the sale proceeded in all respects as it would have done if the mortgage were uncontested. *Held*, that under such circumstances the complainant must be deemed purchaser of the equity of redemption only.

If complainant proposed to contest the mortgage after becoming purchaser it was his duty to have notice given at the time of the sale, so that parties concerned would understand what was claimed and proposed, and could take their measures accordingly; and so that any other persons who might propose to become bidders should be put upon a par with complainant in respect to knowledge of the interests which were offered for sale. A sale at which others would understand they were bidding for the equity of redemption only, but at which complainant would be bidding for an unencumbered title, would be inadmissible, because opposed to the policy of the law which favors full and free competition.

Appeal from Kent. Submitted June 30. Decided Oct. 5.

Bill to clear title. Defendants appeal. Reversed.

E. T. Miller, *E. S. Eggleston* and *Wm. Wisner Taylor* for complainant.

Hughes, *O'Brien & Smiley* for defendants, cited *Pogodzinski v. Kruger* 44 Mich. 79; *Fisher v. Hall* id. 493; *McCullough v. Day* 45 id. 554.

Cooley, J. This is a bill in equity to remove a cloud upon title. The following is a summary of the facts as they are set forth in the bill:

In March, 1875, the defendant John Huggard was the owner of certain parcels of land in the township of Nelson, Kent county, comprising in all two hundred and forty acres, and had the record title thereto. While so the owner, he became indebted to complainant and also to S. D. Clay for professional services. On May 13, 1875, John Huggard mortgaged all the lands to his co-defendant Francis Huggard for the nominal consideration of three thousand dollars,

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but the bill avers that there was no real consideration whatever therefor, and that it was executed for the purpose and with the intent of defrauding complainant and Clay in the collection of their demands. Complainant took an assignment from Clay, and on September 17, 1875, commenced suit against John Huggard and attached the lands. September 22, 1877, complainant obtained judgment in this suit for the sum of $567.16 and costs taxed at $88.77. Subsequent to the attachment releases were given by John to Francis of certain portions of the mortgaged lands, and the bill avers that these were executed with the like intent to defraud. On January 19, 1878, complainant caused all the lands to be sold on an execution issued upon his said judgment, and they were struck off to him as purchaser for the sum of $716.10, and on May 5, 1879, after the time for redemption had expired, they were conveyed to him by the sheriff in completion of the sale. The bill further shows that the mortgage from John to Francis was recorded immediately on its execution, but avers that its existence was only discovered by complainant after he had become purchaser of the lands at the execution sale. The prayer of the bill is that the mortgage and releases be decreed to be altogether fraudulent and void as against complainant, and that the said Francis be required to release.

The answer of the defendants denies all fraud, and insists that the mortgage from John to Francis was given in good faith, and for full consideration of money loaned. Issue was taken on the answer, and the case heard on pleadings and proofs. The circuit court made a decree in favor of complainant, in conformity with the prayer of the bill. It appears from the record that the complainant established the indebtedness, the judgment, the sale and conveyance by the sheriff, but the proofs negative the allegation of the bill that the mortgage came to the knowledge of complainant after the sale was made. The complainant himself testified that he knew of the mortgage while his suit at law was pending, and narrated a conversation he had concerning it with one of the defendants before the judgment was obtained. Upon the

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question of good faith in giving and receiving the mortgage we find in the record a large amount of evidence, very contradictory in its nature. The evidence of the defendants is very circumstantial and positive that the consideration was full and *bona fide*, but the complainant insists that it is overcome by various circumstances of improbability and suspicion which he points out as surrounding the transaction as it is described by defendants.

The questions arising upon the record are—*First*, whether the alleged fraud is established; and if so, *second*, whether in respect of such fraud the law will grant to the complainant the relief he seeks. The second may properly be considered first, in view of the serious conflict of evidence in respect to the fraud.

It is not denied on the part of the defendants that when complainant discovered the existence of the mortgage, some proper remedy was available to him for the purpose of testing its *bona fides*, and having it declared inoperative as against his judgment if he could establish the fraud. The steps usually taken in such cases are, first to levy the execution, and then file a bill in aid. *Williams v. Hubbard* 1 Mich. 446; *Pashby v. Mandigo* 42 Mich. 172; *Pursel v. Armstrong* 37 Mich. 326; *Cole v. Tyler* 65 N. Y. 73; *Hecht v. Koegel* 25 N. J. Eq. 135; *Lewis v. Lanphere* 79 Ill. 187; *Wallace v. Treakle* 27 Grat. 479; *Lindley v. Cross* 31 Ind. 106. A decree for complainant on such a bill would have relieved the title of the cloud which the recorded mortgage cast upon it, and the sheriff would then have been able to offer an unencumbered title to purchasers. Defendants insist that this was the only course open to complainant, and that he was not at liberty to have the land sold in its apparently encumbered condition, and file a bill to set aside the encumbrance afterwards.

The point has never before been distinctly presented in this State, though since the decision in *Cleland v. Taylor* 3 Mich. 202, it has perhaps been assumed that the right to question the *bona fides* of any conveyance by the judgment debtor was as much available to the creditor after he

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had caused the land to be sold on execution and become the purchaser, as it was before. In that case the debtor had made an absolute conveyance, and the creditor, without proceeding to have the conveyance set aside, had become purchaser at the execution sale, and then brought ejectment. The defendant in ejectment questioned the right to inquire into the fraud in a court of law for the purpose of avoiding the deed; but the court, citing and relying upon *Jackson v. Myers* 18 Johns. 425; *Jackson v. Parker* 9 Cow. 73; *Jackson v. Timmerman* 7 Wend. 436, and 12 Wend. 299, and *Stephens v. Sinclair* 1 Hill 143, decided that it was as competent to set aside the fraudulent deed by suit at law as by bill in equity, and that ejectment by the purchaser at the execution sale was a suitable proceeding for the purpose. There are numerous decisions in other states to the same effect, and we do not question their authority.

But the case of *Cleland v. Taylor*, and the others referred to, have little analogy to this. In those cases the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it and take his measures accordingly. So would all persons who should be inclined to become bidders at the sale understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed, but as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would obviously be unimportant.

In this case the situation was altogether different. The judgment debtor had only mortgaged his lands, and an interest remained in him which was subject to execution sale without questioning the mortgage. There is no doubt the judgment creditor might proceed to have this interest sold, and if he might also sell the complete title with the right to have the mortgage annulled afterwards, we must see whether he did the one or the other in this instance. On this point

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the bill is silent, but the silence itself seems to us altogether conclusive against the complainant's case. It does not appear by the bill that the sheriff in any of his action questioned the validity of the mortgage; it does not appear that he offered to sell anything beyond the judgment debtor's apparent interest in the land; it does not appear that at the time of the sale anything was said or done that would have apprised Francis Huggard, the mortgagee, that the right to contest the mortgage was involved in the sale, or that would have given one coming there in the character of bidder to understand that something besides the equity of redemption was being sold. A stranger to the judgment purchasing under such circumstances would have purchased the equity of redemption only, for he would have bid for nothing else, and would have offered and paid only what he considered the equity of redemption worth to him.

It cannot plausibly be claimed that the law will suffer the judgment creditor to occupy any more favorable position as bidder at his sale than do all other persons. Judicial sales are required to be public for the purpose of inviting full and free competition, with the primary object of producing for the benefit of parties concerned as large a price as public biddings can secure for them. A secondary object is to give all who may desire the property an equal opportunity to compete for it. But full and free competition implies that all parties have equal knowledge of the state of the title; and the policy of the law is defeated if some one party may bid with such advantages as render competition impossible. *Ledyard v. Phillips* 32 Mich. 13.

But nothing can be plainer than that, if the judgment creditor could bid with the secret assurance that he was to have an unencumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question. Not only would this be unfair to other bidders, and for that reason inadmissible, but it would be particularly unfair to the mortgagee. When the sale appears

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to be of the equity of redemption only, the mortgagee has no occasion to trouble his mind about it; but if he were distinctly notified that it was made in hostility to his mortgage, he might, even if conscious of his good faith, prefer to redeem rather than encounter the risks of litigation. This would be his legal right and it cannot lawfully be taken from him through a secret understanding between the officer and the creditor of which he has neither actual nor implied notice. It is true that if the defendant Francis Huggard has knowingly accepted a fraudulent mortgage and becomes a loser thereby, he is entitled to no sympathy; but even voluntary fraud does not put one's interests out of the protection of the law, or entitle the party defrauded to confiscate them. A fraudulent conveyance is good as between the parties; *Cleland v. Taylor* 3 Mich. 203; *Millar v. Babcock* 29 Mich. 526; *McMaster v. Campbell* 41 Mich. 513; and even creditors are not permitted to assail it except by judgment and execution. *Fox v. Willis* 1 Mich. 321. And there may be equities between the parties which will support a mortgage, void as to creditors, when the creditors do not attack it by proper proceedings.

While therefore the complainant had an undoubted right to have the *bona fides* of the mortgage tested before sale, there can be no equity in permitting him to purchase the land apparently subject to the mortgage, and then to have its lien annulled afterwards. He has a right to reach his debtor's property, and have it sold for what it will bring at a fair and open sale; but he has no claim to speculate out of his debtor's fraud, and by using the mortgage to keep others from competing, obtain the property for so much less than its value. A purchase under such circumstances must be held to be, what it appeared to be at the sale, a purchase subject to the mortgage.

These views render the question of fraud in taking the mortgage unimportant. The decree so far as it directed a release of the mortgage is erroneous and must be reversed with costs of this court. As the releases by John to Francis Huggard were subsequent to the levy of the attachment on

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the lands, they could not have affected complainant's right to redeem from the mortgage, and a declaration of their invalidity seems therefore unimportant. Complainant can, however, if he deems it material, embody in the decree a provision that the releases are inoperative as against his right to redeem.

The other Justices concurred.

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THE CITY OF PORT HURON v. ALBERT MCCALL.

Municipal power to issue refunding bonds—Repudiation of debt.

Under the provision in the charter of Port Huron which empowers the common council to "issue new bonds for the refunding of bonds and evidences of indebtedness already issued," the common council may issue new bonds to raise money for the satisfaction of judgments.

Municipal powers are to be construed strictly; but the reason for strictness has little application when they are of a nature to concern no one but the people of the municipality; as for example, when they relate merely to a change in the form of municipal indebtedness. The question in such a case is, what was probably the legislative intent in granting a power.

If a city has obtained money on a particular construction of a power, and then adopts a different construction to avoid payment, it is proper to give some weight to the first construction, if the question is one of doubt.

Error to St. Clair. Submitted April 7. Decided Oct. 12.

ASSUMPSIT. Defendant brings error. Affirmed.

Chas. K. Dodge and *A. E. Chadwick* for plaintiff in error. Municipal bonds issued under act 266 of 1865 were void: *Thomas v. Port Huron* 27 Mich. 320; so were municipal bonds issued under act 45 of 1869: *Bay City v. State Treasurer* 23 Mich. 499; the municipal powers of taxation, borrowing money, contracting debts and loaning credits are absolutely limited upon the words of grant and permission

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in the charter: *Thomas v. Railroad Company* 101 U. S. 82; *Bank of Augusta v. Earle* 13 Pet. 587; a corporation created by statue derives all its powers from the statute and can only exercise them in the mode therein prescribed: *Fertilizing Co. v. Hyde Park* 97 U. S. 666; corporate powers can never be created by implication or extended by construction: *Penn. R. R. v. Canal Com'rs* 21 Penn. St. 22; *Moran v. Miami County* 2 Black 723; *Minturn v. Larue* 23 How. 435; *Beach v. Fulton Bank* 3 Wend. 583; *Zottman v. San Francisco* 20 Cal. 102; *Brady v. New York* 2 Bosw. 173: 1 Dill. Mun. Corp. §§ 55, 108; 2 id. § 605; Cooley Const. Lim. 195; Cooley on Taxation 209; *Marsh v. Fulton County* 10 Wal. 683; *Reg. v. Lichfield* 4 Ad. & El. (N. S.) 908; a person dealing with an agent exercising delegated powers in giving him paper, must see at his peril that the paper falls within the power: *Floyd Acceptances* 7 Wal. 676; the power to issue bills for certain purposes excludes the power to issue them for other purposes: *Thomas v. Richmond* 12 Wal. 351; and paper so issued may be held void if it does not cover all the purposes designated: *Police Jury v. Britton* 15 Wal. 566; or if it exceeds the constitutional limit of indebtedness: *Buchanan v. Litchfield* 102 U. S. 279; a corporation cannot ratify an act it could not have done: *Highway Com'rs v. Van Dusan* 40 Mich. 431; general acts cannot by implication repeal charters: 1 Dill. Mun. Corp. 54; *Bond v. Hiestand* 20 La. Ann. 139: *Hammond v. Haines* 25 Md. 541; *Cumberland v. Magruder* 34 Md. 381; *Ottawa v. County* 12 Ill. 339; *Egypt Street* 2 Grant's Cas. 455; *State v. Branin* 3 Zab. 484; general legislation must give way to inconsistent special legislation on the same subject: *State v. Clarke* 1 Dutch. 54; *State v. Jersey City* 5 Dutch. 170; *Jersey City v. Railroad Co.* 20 N. J. Eq. 360;

Geo. V. N. Lothrop for defendant in error. The railroad aid law conferred a special and exceptional power to be exercised largely outside of charter methods: *Davison v. Otis* 24 Mich. 26; a corporation cannot by representations or by silence involve others in onerous engagements and then defeat the claims that have arisen in consequence: *Bissell v.*

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Jeffersonville 24 How. 300; powers expressly granted or necessarily implied are not to be defeated or impaired by stringent construction: *Kyle v. Malin* 8 Ind. 37; *United States v. Freeman* 3 How. 564; *Parsons v. Wayne Circuit Judge* 37 Mich. 290; *Beecher v. Marq. & Pac. R. Mill* 45 Mich. 103; to prevent injustice by a technical merger a judgment is to be regarded as not strictly a new debt but an old debt in a new form: *Clark v. Rowling* 3 N. Y. 220; where a municipality, in acting upon its own construction of its charter powers, has issued obligations and induced *bona fide* purchasers to take them, it will be bound by its own action: *Van Hostrup v. Madison* 1 Wall. 297; *Meyer v. Muscatine* id. 385; long practical construction is to be regarded in ascertaining the force of a statute: *Sherwin v. Bugbee* 16 Vt. 444; *Portsmouth Savings Bank v. Springfield* 4 Fed. Rep. 276; *People v. May* 3 Mich. 606; *Johnson v. Ballou* 28 Mich. 384; where a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper: *Gelpcke v. City of Dubuque* 1 Wall. 203; *Meyer v. Muscatine* 1 Wall. 384; *Supervisors v. Schenck* 5 Wall. 784; *Lexington v. Butler* 14 Wall. 296; *Mercer County v. Hacket* 1 Wall. 83; *Hackett v. Ottawa* 99 U. S. 95; *Pompton v. Cooper Union* 101 U. S. 204; the reception and retention in the city treasury of the purchase price of the bonds, its use for municipal benefit, and the repeated payment of interest on the bonds, estop the city from a defence founded on irregularities in the exercise of a granted power: *Pendleton v. Amy* 13 Wall. 297; *County of Henry v. Nicolay* 95 U. S. 626; *Rogers v. Burlington* 3 Wall. 667; *County of Randolph v. Post* 93 U. S. 514; *County of Ray v. Vansycle* 96 U. S. 687; *County of Daviess v. Huidekoper* 98 U. S. 102; this would not apply where there was no power at all to issue bonds: *Loan Association v. Topeka* 20 Wall. 655; where the power exists an issue in excess of the amount

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limited by law does not impair bonds in the hands of a *bona fide* holder; *Marcy v. Oswego* 92 U. S. 637; *Wilson v. Salamanca* 99 U. S. 499; *Walnut v. Wade* 13 Chicago Legal News, 286; nor does the failure to register bonds as required, or variations in rate of interest and time of maturity: *Rock Creek v. Strong* 96 U. S. 271; or issue in a lump sum of bonds authorized for buying depot grounds: *Converse v. Scott* 92 U. S. 503; or an erroneous reference to the statute giving authority: *Commissioners v. January* 94 U. S. 206; the municipality may be liable though bonds dated while a certain person was clerk, were not actually signed by him till after his term of office had expired: *Weyauwega v. Ayliny* 99 U. S. 112; and generally when there is power to issue bonds, irregularities or misconduct on the part of town officers do not impair the bonds in the hands of *bona fide* holders: *East Lincoln v. Davenport* 94 U. S. 801; when a power to issue bonds is given to a municipality, subject to some condition precedent, the existence of which is to be determined by those who are to issue the bonds, a recital in the bonds that the condition exists is conclusive in favor of a *bona fide* holder of the bonds: *Commissioners v. Aspinwall* 21 How. 544; *Bissell v. Jeffersonville* 24 How. 287; *Moran v. Commissioners* 2 Black 722; *Lynde v. County* 16 Wall. 13; *Coloma v. Eaves* 92 U. S. 484; *Venice v. Murdock* 92 U. S. 494; *Humboldt v. Long* 92 U. S. 642; *Leavenworth v. Barnes* 94 U. S. 70; *Commissioners v. Bolles* 94 U. S. 104; *Commissioners v. Clark* 94 U. S. 287; *San Antonio v. Mehaffy* 96 U. S. 312; *County of Warren v. Marcy* 97 U. S. 96; *Block v. Commissioners* 99 U. S. 694; *Commissioners v. Nichols* 14 Ohio St. 260; *Soc. for Savings v. N. London* 29 Conn. 174; *Railroad Co. v. Evansville* 15 Ind. 395; where a city had issued paper like bank notes which for that reason were of doubtful validity, and afterward issued bonds to take it up under a power to issue bonds to extend such indebtedness as it was unable to meet at maturity, the bonds were held valid: *Little Rock v. National Bank* 98 U. S. 308; nec enim ulla res vehementius rempublicam con-

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tinet quam fides; quae esse nulla potest nisi erit necessaria solutio rerum creditarum: *Cicero de Officiis* l. ii, c. xxxiv.

Cooley, J. To an understanding of this case a brief summary of the facts is essential.

Under certain legislative acts purporting to empower the city of Port Huron to grant municipal aid to the Port Huron & Lake Michigan Railroad, the city subscribed a large sum to the stock of the company engaged in building that road, and issued bonds for the amount of the subscription. These bonds were negotiable, and soon passed from the railroad company into the hands of purchasers.

Subsequently to these issues, in the case of *People v. Township Board of Salem* 20 Mich. 452, this court decided that it was incompetent under the Constitution of the State to pass acts empowering municipalities to grant aid to railroads. Notwithstanding that decision the municipalities which had issued bonds in conformity with the invalid legislation, generally recognized their obligation to provide payment, and proceeded to do so without dissent on the part of their people. In some cases suits were brought in the federal courts and recovery had. In some other cases suits were brought in the State courts and judgments allowed to pass by default or on confession. In Port Huron the controlling sentiment seems to have favored the payment, without question, of the bonds the city had issued, and some of them were put into judgment in State and federal courts without contest. In January, 1875, the city attorney was instructed by a vote of the common council to confess judgment in all suits brought upon the bonds.

I think we are agreed that the question of the original validity of the bonds which have been put in judgment is now wholly unimportant. The good faith of the city authorities in suffering the judgments to be taken is not impugned, and they stand unquestioned. We are, therefore, excused from any discussion of some of the points made.

The charter of the city was revised in the year 1869. One section of the revision is as follows: "No loan, bond, or other

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evidence of debt not expressly authorized by this act, or by any act hereby continued in force, shall be made or issued by the common council or any officer of the corporation; provided, however, that the common council may issue new bonds for the refunding of bonds and evidences of debt already issued, and the proper officer of the corporation may draw and issue orders on the treasury for the necessary and current expenses of the city." Laws of 1869, vol. 3, p. 1554.

Under the assumed authority of this provision of the charter, the common council in October, 1874, voted to sell eight per cent. bonds, at a price not below par, for the payment of judgments on railroad aid bonds, and proposals for the bonds were invited by public notices. In the following month the interest offered was increased to ten per cent., and proposals were then received and bonds issued from time to time to the amount in all of $80,000 and upwards. The money received for these bonds was paid into the city treasury, and was used to satisfy judgments rendered upon the railroad aid bonds.

The charter of the city was again revised in 1877, and the following are the provisions which bear upon the issue of bonds:

"The common council shall with the approval of the board of estimates also have power to provide money for the water fund, the sewer fund, the school building fund, the public building fund, and the bridge fund, by borrowing upon the faith and credit of said city, and upon the best terms that can be made, such sums of money as shall be deemed necessary and expedient, and to issue the bonds of the city therefor, but said bonds shall not be negotiated at less than their par value or bear interest to exceed seven per centum. * * *

"Bonds issued under the preceding section shall be respectively denominated 'water bonds of the city of Port Huron,' 'sewer bonds of the city of Port Huron,' 'school building bonds of the city of Port Huron,' 'public building bonds of the city of Port Huron,' and 'bridge bonds of the city of Port Huron,' and shall be regularly dated and numbered in the order of their issue, shall be for sums not less than one hundred dollars each, and shall be payable in not less than ten or more than thirty years from date;

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shall be issued under the seal of the corporation, signed by the mayor and clerk, and countersigned by the controller. The controller shall keep an accurate record of said bonds, and of the class of indebtedness to which they belong, the number, date, and amount of each bond, its rate of interest, when and where the same is payable, and the person to whom it is issued. The proceeds of said bonds shall be paid into the city treasury and be credited to the funds for which the bonds were issued, and be applied exclusively to the purposes for which said funds are constituted by this act.

"No loan, bond, or other evidence of debt not expressly authorized by this act or any act hereby continued in force, shall be made or issued by the common council or any board or officer of the corporation: provided, however, That the common council, subject to the approval of the board of estimates, may issue new bonds for the refunding of bonds and evidences of indebtedness already issued, subject to all the limitations and regulations contained in the two preceding sections: And provided further, That the controller may draw and issue orders on the treasurer for the necessary and current expenses of the city and of the several boards, as the same may be allowed by the common council." Local Acts 1877, pp. 229–230.

It was after this revision that the bond whose validity is questioned in this suit was issued. It was issued as a refunding bond, and the proceeds applied to the satisfaction of judgments rendered upon railroad aid bonds previously outstanding.

It is insisted that the charter as thus revised does not authorize the issue of refunding bonds for the railroad aid indebtedness, but that on the contrary the issue of new bonds is restricted to the refunding of those issued for the several purposes which are here specified. The new bonds, it is said, are to be issued, "subject to all the limitations and regulations contained in the two preceding sections;" and those sections name four classes of bonds, not including the railroad aid bonds, and require the moneys raised on each class of bonds to be credited to the fund for which the bonds were issued, and to be applied exclusively to the purposes for which such fund is constituted.

This argument is sound if the view is correct which is taken of the third section above quoted, that it restricts the

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power of refunding to the bonds before particularly specified. But in terms it contains no such restriction: the words are as general as possible, and cover "bonds and evidences of indebtedness" without limitation. If there were nothing further in the section, it would seem clear that the intent was to confer an unrestricted power. But the power is restricted in this: that the refunding bonds must be issued "subject to all the limitations and regulations contained in the two preceding sections." What are these? It seems to me there should be no question on this point. The bonds must not be sold below par; they must not bear more than seven per cent. interest; they must be payable in not less than ten nor more than thirty years; and then there are further directions to ensure an orderly issue and a perfect record. These are limitations and regulations proper to be imposed on the issue of any bonds, and they were wisely imposed here. But if the purpose was to restrict the issue of refunding bonds to the indebtedness pertaining to the particular funds named, it is reasonable to conclude that this would have been done in terms. The language granting power to refund is general, and the restraining proviso is fully satisfied by applying it to the particulars which have been specified. There is no apparent reason for extending it by construction, and no reason is suggested for supposing the Legislature intended to preclude the city from refunding its aid bonds. The legislative sentiment was not adverse to their payment. On the contrary there was then in existence a legislative act passed two years previously expressly empowering the several municipalities to levy taxes for the payment of railroad aid bonds previously issued by them, and the legislative intent that they should be paid was unquestionable. We should naturally expect, therefore, that any legislation for the refunding of existing indebtedness would be sufficiently general to include such bonds: and when we discover that which is apparently general, we are not invited by the circumstances to any narrow interpretation on the supposition that such was the legislative intent. All apparent reasons point in the opposite direction.

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But it is also said that refunding bonds may be issued only for the refunding of "bonds and evidences of indebtedness already issued;" and a judgment is not an evidence of indebtedness issued. A judgment is the act of a court; but the refunding provision intends the obligations which the city itself has issued as evidence of its indebtedness, the bonds, notes, etc., and this view is strengthened by the following section—§ 12, p. 231—which provides that "All bonds and evidences of debt, when refunded, shall be cancelled and destroyed by the treasurer in the presence of the controller and a special committee of the common council appointed for that purpose. He shall record and keep an accurate description of all bonds and evidences of debt thus cancelled and destroyed." A judgment, it is said, cannot be thus cancelled and destroyed.

This view of the statute is an after-thought on the part of the city authorities. It seems never to have occurred to them until after the refunding bonds had been issued and sold, and judgments paid from the proceeds. The point is now made, when its effect, if sustained, is to defeat obligations for which full value has been given, after the city has appropriated the avails. It is to be assumed that the city officers when they paid the judgments, found some method of cancelling and destroying them. The point is therefore absolutely without equity, and is entitled to such consideration only as a just construction of the statue will compel us to give it.

This view of the statute is also very narrow and technical. It comes from a strict and narrow interpretation of words, such as persons are accustomed to resort to when they would assign plausible reasons for circumventing a statute without expressly antagonizing it. It is easy to say that a judgment is not an evidence of indebtedness issued; but it is just as easy to say the contrary, and with quite as good reason. A judgment is not only an evidence of indebtedness, but it is of the highest and most conclusive nature. And there is no straining of language in saying that the judgment is issued. The word is not the most appropriate, but we know

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that persons who are not critical in the use of language sometimes speak of a court having issued its judgment. And what difficulty there can be in cancelling and destroying a judgment I do not understand. The utterance of the judge pronouncing it cannot be destroyed; the book in which it is entered is to be preserved as a perpetual record; but the judgment as an evidence of indebtedness is cancelled when it is paid and receipted, and if the discharge is entered upon the record, as is customary, it is an effectual destruction. If the treasurer cannot do this in person, he can cause it to be done. The statute does not indicate any particular method of destruction: the method must be suited to the case.

It is not very agreeable for a court to be thus invited to a critical examination of words to defeat an obligation which has been issued and paid for under an opposite interpretation. The case under such circumstances ought to be too clear for doubt or question; it ought to be so plain that at first blush we feel compelled to say that the parties receiving the obligation ought to have known it was issued without authority and in fraud of the law, and are therefore fairly chargeable with fault in receiving it. If the true construction of the law is in doubt, the city ought to be held to the view its own authorities took of it when borrowing money under it, especially as nothing was involved in the original action but the mere change in the form of a city debt.

There is a principle of law that municipal powers are to be strictly interpreted; and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted. But when a power is conferred which in its exercise concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous, and which wrongs no one, and the State is in no manner concerned, the construction ought to stand.

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That is good sense, and it is the application of correct principles in municipal affairs.

It is worthy of note as having possible bearing on the legislative intent, that the alternative to issuing refunding bonds must have been the levy of taxes to make immediate payment of the judgments; and this must have operated oppressively and perhaps brought disaster upon the city.

I think the judgment should be affirmed.

MARSTON, C. J. and CAMPBELL, J. concurred.

GRAVES, J. I concur in the result.

46	575
111	88
46	575
134	s286
134	287
46	575
f150	1344

LOREN DAY, LAFAYETTE E. TAYLOR AND CHARLES BLACKMAN v. GUY S. WALDEN.

Easement not lost by mere neglect to enjoy but by lapse of appurtenance—Estoppel.

An easement created by grant is not lost by neglect of enjoyment for twenty years or more, in the absence of any evidence of occupancy adverse to it.

Whether the owner of an easement who has permitted another without objection to make valuable erections which cannot be enjoyed consistent with his use of the easement, is not by his apparent acquiescence estopped from claiming the easement afterwards—*Q.*

An easement to take water on one tenement to be used for operating a mill on another, when created as an easement appurtenant to the mill and not to any described parcel of land, is lost when the mill goes to decay or is destroyed and not rebuilt.

Error to Kent. Submitted Apr. 14. Decided Oct. 12.

CASE. Defendants brings error. Reversed.

J. C. FitzGerald for plaintiff in error. A servitude may be extinguished by the act of the party who enjoys it: (*Taylor v. Hampton* 4 McCord 96; *Corning v. Gould* 16 Wend. 538; 3 Kent's Com. 449;) as by permitting the owner of the estate charged with it to so manage as to pre-

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vent its enjoyment: *Farrar v. Cooper* 34 Me. 400; *Tracy v. Atherton* 36 Vt. 509; *Crossley v. Lightowler* L. R. 3 Eq. Cas. 291; and innocent purchasers take the land discharged of the easement even if the party entitled to it had only intended to suspend its use: *Moore v. Rawson* 3 B. & C. 332; the doctrine of estoppel may be applied against a licensor: *Swartz v. Swartz* 4 Penn. St. 353; *Cumberland R. R. v. McLanahan* 59 Penn. St. 25; *Sheffield v. Collier* 3 Kelley 82; *Cook v. Pridgen* 45 Ga. 331; *Lane v. Miller* 27 Ind. 534; *Russell v. Hubbard* 59 Ill. 335; *Wilson v. Chalfant* 15 Ohio 248; adverse use of land for twenty years extinguishes a surface easement: *Chandler v. Jamaica Pond Aqueduct* 125 Mass. 549; possession will be presumed adverse: *Perrin v. Garfield* 37 Vt. 310; adverse and exclusive use furnishes presumptive evidence of a grant: *Watkins v. Peck* 13 N. H. 370; *Bullen v. Runnels* 2 N. H. 257; where an ancient ditch once opened into a water course and the owner of a mill on the stream had kept the end of the ditch closed for twenty years, it was held that he could keep it closed: *Drewett v. Sheard* 7 C. & P. 465.

Champlin & More for defendant in error. Silence does not estop one unless it has misled another to his injury: *Railroad Co. v. Dubois* 12 Wal. 64; *Hill v. Epley* 7 Casey 334; *Taylor v. Ely* 25 Conn. 250; *Freeman v. Cooke* 2 Exch. 654; *Dyer v. Cady* 20 Conn. 564; Bigelow on Estoppel 476; *Kingman v. Graham* 51 Wis. 232; non-user does not of itself work an abandonment of an easement: Angell on Water-courses § 252; *Bannon v. Angier* 2 Allen 128; the owner's right is destroyed by the adverse enjoyment of another: *Smyles v. Hastings* 22 N. Y. 217; *Townsend v. McDonald* 2 Kern. 381; *Pillsbury v. Moore* 44 Me. 155; *Ward v. Ward* 7 Exch. 838; Washb. on Easements 551.

Cooley, J. Walden sued the plaintiffs in error, in an action on the case for tearing down a dam, and thereby precluding his enjoyment of a water-power, the right to the use of which he claimed as an easement. The declaration

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averred that at the time of the committing of the alleged grievances, the plaintiff was owner in fee-simple and lawfully possessed of a certain water-power and mill-site with the appurtenances, situate in the township of Wyoming, in the county of Kent and State of Michigan, and upon lands in like manner owned and possessed by the plaintiff, "and more particularly described as follows: Beginning at a point in or near the village of Grandville, where the north bounds of Prairie street intersects the west bounds of the canal or mill-race running across said street; thence westerly along the north bounds of said Prairie street two hundred feet; thence north two hundred feet; thence east two hundred feet to the west bounds of said canal or mill-race; thence south along the west bank of said canal or mill-race two hundred feet to the place of beginning; with the right of using so much of the water from said mill-race as may be necessary to propel four runs of stones to be used for the ordinary purposes for a grist or flouring mill; the volume of water to be used to be three cubic feet, under a pressure of eight feet head; also the use of a street of the ordinary width of streets in said village for ingress and egress to and from said conveyed premises. Also the use and enjoyment of five feet of land around said premises, for light and air. Also sufficient land for a tail-race from said premises to Buck creek, as now excavated, being the same premises and appurtenances which were conveyed to one George Ketcham, then of the city of Marshall in said State, by Thomas J. Hulbert, by deed dated the 15th day of November, 1838, and recorded in the records of Kent county on the 19th day of November, 1838, reference being had to said deed for a more minute and particular description thereof." That the water-power mentioned in said description was formed by the water from said Buck creek, which was turned into said mill-race by a dam across said creek; that the plaintiff acquired his said title January 16, 1877, at which time said dam was in existence, and raised the water in said creek so as to give a head of eight feet by means of said race upon the said lands of the plaintiff; that said

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plaintiff "was the owner and in possession of the lawful right to have said dam remain as it was at the time of his said purchase, and to keep the same in perfect order for raising the water of said Buck creek to the head of eight feet;" but that the defendants disregarding his rights, on the first day of June, 1878, tore away and destroyed said dam and thereby prevented the water flowing in and along said mill-race, etc. There were other counts in the declaration in which the plaintiff claimed the water-power as appurtenant to a mill-site not particularly described by metes and bounds.

On the trial it appeared from the plaintiff's evidence that in the year 1838 Thomas J. Hulbert, mentioned in the declaration, was owner in fee-simple of the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section eighteen in the township which includes the platted village of Grandville, and that in that year he erected a grist and flouring mill on said northeast quarter of the southwest quarter, near said canal or mill-race, and the same was operated by water taken from said canal or mill-race, through which the water was forced by a dam; that on November 15, 1838, Hulbert gave a deed to one George Ketcham of the land described in the declaration, supposing that the mill was upon it, and Ketcham took possession and the mill continued to be operated by means of said water-power until January, 1843, when it was destroyed by fire, and has never been rebuilt. The original deed from Hulbert to Ketcham was not put in evidence but only an abstract thereof. In the abstract the premises conveyed were described as follows: "Beg. on north line of Prairie st., on west bank canal; thence west 200 ft.; thence north 200 ft.; thence east 200 ft.; and thence south 200 ft.; and water-power." It further appeared that Hulbert was mistaken in supposing the mill to be on the land described; that, in fact, it was wholly upon other lands, and those described were nearly all upon the northwest quarter of said section. It further appeared that plaintiff had become possessed through several intermediate convey-

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ances, of the rights which Hulbert conveyed to Ketcham, and the deeds, which were put in evidence, purported to convey not only the lands described with the water-power, but the "mill and building thereon situate." The plaintiff's immediate grantor was Horace Wilder, who became owner April 4, 1850, and continued to be owner until January 16, 1877, when he conveyed to the plaintiff. It further appeared that the dam which turned the water into the race was washed away in 1849, and was rebuilt by Wilder in 1850, and that Wilder at some time not named put up a building to be used for a grist-mill a short distance from where the one stood that had been burned down, but not on the land described in the declaration, and the same was never completed or used. The defendants tore away the dam in June, 1878.

On the part of the defendants it was shown that the water-power now claimed by the plaintiff had never been used since the burning of the Ketcham mill in 1843; that in 1858, the land where the dam and race are was owned by Egbert Dewey and Joseph Blake, who conveyed to defendants March 6, 1878; that when defendants purchased of Dewey & Blake there was a mill on the lands purchased worth more than ten thousand dollars, which was operated by water-power, obtained by means of a dam across Buck creek, higher up than the one which was torn away; that after their purchase defendants commenced to make and did make extensive and valuable permanent improvements to the mill and appurtenances, rebuilding the dam above the same, excavating a race from the dam to the mill, more than three-quarters of a mile, and changing the mill from a grist-mill to a plaster-mill, and expending in such improvements about ten thousand dollars; that the dam which was torn out was about fifty-five rods down the creek from defendant's mill; that for many years before their purchase the race through which plaintiff claimed a right to take water had not had any current of water passing through it, and had the appearance of an abandoned ditch, grown over with grass and weeds, and cattle and horses pasturing by it would

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pass over, through and along it at pleasure, and without inconvenience; that the dam which formerly turned the water into it was rotten and dilapidated; that when defendants purchased they had no knowledge that Wilder or any other person made any claim to any right, title, or interest in the said dam or race, or to any water-power created or furnished thereby, nor did they have such knowledge until after the dam was torn away as above stated; that the dam had not for several years been any material obstruction to the free passage of the water in said creek, except in times of freshets, when drift-wood and other refuse matter would lodge there upon the rotten timbers which remained, and that never since the burning of the Ketcham mill had the dam been used for the purpose of supplying power. Also that the Dewey & Blake mill was erected in 1858, at a cost of $13,000; that the dam which was torn out if kept up to its original height would set back the water upon that mill so as seriously to interfere with its operation and impair its value, and that Wilder, while the mill was being erected and afterwards while defendants were improving and extending it, lived near it and was cognizant of the expenditures which were being made, and made no claim to a right to maintain the old dam, and said nothing to apprise Dewey & Blake, or the defendants, that a claim would be set up, which, if valid, would render their mill and the expenditures thereon of little or no value.

The defendants also gave evidence that the south twenty acres of the northwest quarter of section eighteen, being the twenty acres on which the dam which was torn out and defendants' mill were situated, was sold for the taxes delinquent for the year 1876, and a tax title obtained by Luman Jenison who subsequently conveyed to defendants. Also that the undivided five-sixths of the northeast quarter of the southwest quarter of section eighteen, which includes the site of the old Ketcham mill, was sold for the taxes delinquent for the year 1847, and the title acquired by George H. White, and that the whole of said last-mentioned parcel was sold for the taxes delinquent for 1852 and the title acquired

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by said White, who subsequently conveyed to Horace Wilder. This evidence was given for the purpose of an argument that the tax sales separated the easement from the land to which it was appurtenant, and thereby extinguished the easement; but the circuit judge ruled that they had no such effect.

Upon the foregoing facts and evidence, the legal questions discussed by the parties in the circuit court and in this court were substantially the following:

1. Has the plaintiff shown any right to the easement described in his declaration? If so, then,

2. Has the easement been lost by abandonment or by adverse possession? Or,

3. Is the plaintiff estopped from now setting up the easement by the failure of Wilder to claim it when Dewey & Blake were erecting their mill and the defendants were making their improvements? And,

4. Do the tax sales affect in any way the rights of the plaintiff?

These questions will be considered in their order.

I. In order to show his right to the easement, it became necessary for the plaintiff to prove title in himself to the land to which the easement was appurtenant. The land is described in one count of the declaration; but as thus described, the evidence is very clear and conclusive that the plaintiff does not own the major part of it. The most of it was land that Hulbert never owned; and when he conveyed to Ketcham, his deed to that extent was inoperative. If therefore the easement in dispute was appurtenant to the land particularly described in this count, the action could not be maintained, because there must be another owner to a part of the land who would be a necessary party.

But there is evidence in the case from which the jury might perhaps be justified in finding that the description contained in the deed from Hulbert to Ketcham, instead of being in the abbreviated form given in the abstract which was put in evidence, was in fact identical with the descrip-

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tion in a subsequent deed given by Ketcham to one Emery, which was as follows:

"All that certain piece or parcel of land situate, lying and being in the village of Grandville, bounded and described as follows, viz.: Beginning at a point in said village where the north line of Prairie street intersects the west line of the canal or mill-race running across said street; thence running westerly along the north bounds of said Prairie street two hundred feet; thence north two hundred feet; thence east two hundred feet to the west bounds of said canal or mill-race; thence south along the west bank of said canal or mill-race two hundred feet to the place of beginning; and also the mill and buildings thereon situate, and the right of using so much water from said mill-race as may be necessary to propel four runs of stones to be used for the ordinary purposes of grist and flour mill. The column of water to be used may be three cubic feet, under a pressure of eight feet head. Also the use of a street of the ordinary width of streets in said village for access to and egress from said mill; also the use and enjoyment of five feet of land around said premises for light and air, and also sufficient land for a tail-race from said mill to the creek as now excavated."

If the jury should reach that conclusion, then it would be manifest that there was an inconsistency in the particulars given in the descriptive part of the conveyance to Ketcham, and one part or the other was erroneous. The mill was not upon the two hundred feet square which was particularly described, and either that description, or that of the mill itself, must be rejected from the deed as presumably inserted in error, since it is manifest that it was not the purpose to convey both. Under such circumstances the general rule requires that that particular should be rejected, as presumably erroneous, which contains the lesser elements of certainty, and in respect to which a mistake would be least likely to occur. This rule I think would require us to reject the particular description by metes and bounds. It is true it seems very strange that the two hundred square feet

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should be erroneously located when such boundaries are given as a mill-race and a street, but this is in part explained by evidence which shows that the street was not at that time opened, nor the mill-race extended so far as the land supposed to be conveyed. The village of Grandville was in fact little more than a village on paper, and an error in locating lands on the line of one of its supposed streets was not therefore very remarkable. But it would have been astonishing if Hulbert, intending only to convey two hundred feet square of unoccupied grounds, should by mistake after describing it, add the words "and also the mill and buildings thereon situate." It is almost impossible to conceive of such a mistake being committed; and the just conclusion is that it was the mill the deed was intended to convey, and not the parcel particularly described. *White v. Williams* 48 N. Y. 344. The parties themselves so interpreted the conveyance, for Hulbert gave possession to Ketcham at the time. I think, therefore, the action might be maintained on the counts which only averred the plaintiff's ownership of the mill-site, but did not particularly describe it.

II. The right to the easement was not lost by the mere neglect to assert, use and enjoy it for the period of twenty years. There is no doubt of this upon the authorities. The easement was created by grant as an appurtenance to the mill; and there were no conditions or limitations attached which rendered its use necessary to its continuance. The grant was perpetual, and without conditions; and therefore the privilege granted would continue indefinitely whether the grantee did or did not avail himself of it. An accepted grant cannot be waived or abandoned; and the neglect of the grantee to enjoy the easement would be no more significant in its bearing upon his rights than the neglect to enjoy the freehold to which the easement was appurtenant. *Arnold v. Stevens* 24 Pick. 106; *Bannon v. Angier* 2 Allen 128; *Hayford v. Spokesfield* 100 Mass. 491; *Owen v. Field* 102 Mass. 114; *Barnes v. Lloyd* 112 Mass. 224; *Taylor v. Hampton* 4 McCord 96; *Elliott v. Rhett* 5 Rich. 405; *Corning v. Gould* 16 Wend. 531; *Wiggins v. McCleary*

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49 N. Y. 346; *Hall v. McCaughey* 51 Penn. St. 43; *Ward v. Ward* 7 Exch. 838; *Carr v. Foster* 3 Q. B. 581; *Crossley v. Lightowler* L. R. 3 Eq. Cas. 279; s. c. on appeal 2 Ch. App. 478; *Cook v. Mayor* L. R. 6 Eq. Cas. 177.

III. Neither was the easement lost under the statute of limitations. There was no evidence of any occupation of the land in hostility to the easement, or of any distinct denial of the easement until the defendants tore out the old dam There was therefore nothing that could be regarded as an enjoyment adverse to the easement prior to that time. *Cooper v. Smith* 9 S. & R. 26.

IV. The question of estoppel which the parties raise does not seem to me entirely free of all difficulty. The point made by the defendants is this: that Wilder, owning the mill-site and appurtenant easement, when he saw Dewey & Blake putting up a valuable mill which would be worthless if the easement was insisted upon, and afterwards when he saw defendants making costly improvements to the mill, was bound in good faith to the parties thus expending their moneys, to notify them that the easement was still claimed; and having failed to do this, he and his grantee must be held estopped from claiming the easement now. There is very great reason in this position, provided Wilder was aware at the time of the expenditures that the enjoyment of the easement would be incompatible with the operation of the Dewey & Blake mill; which is not made so clear by the evidence as it should have been if the fact was so. But we have held repeatedly that title to land cannot pass by estoppel: *Hayes v. Livingston* 34 Mich. 384; *Nims v. Sherman* 43 Mich. 45; *White v. Hapeman* 43 Mich. 267; *Showers v. Robinson* 43 Mich. 502; and if the rule applies to the extinguishment of easements, the point made by defendants must be considered not well taken. In *Maxwell v. Bay City Bridge Co.* 41 Mich. 453, 467, several cases are referred to in which it has been held that the owner of lands may be estopped from revoking a parol license, where his conduct has rendered the revocation inequitable; and the effect of the estoppel would be to create an easement. If an easement

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may be created by estoppel, it may certainly be extinguished by estoppel; and in *Arnold v. Cornman* 50 Penn. St. 361, it was decided, that if one having a right of way across the land of another, stand by and, without objection, permit the owner of the land to erect a building across it, he will be estopped from objecting afterwards. No doubt the application of such a rule would accomplish substantial justice in a great many cases.

But it is important that we understand precisely what the easement is in respect to which an estoppel is claimed. The plaintiff assumes that it is an easement for water-power appurtenant to certain described lands, and that he has a right to make it available at any time, not exceeding its limitations by the grant. The mill which was upon the land when the easement was created burned down, and for thirty-four years it was not rebuilt, nor has there been evidence of an intention to rebuild. It is true that after the dam had been washed out, it was rebuilt in 1850, but it does not appear that it was with any purpose or expectation to make use of the power on the site of the old mill. There has therefore been no practical assertion of a right to the easement for thirty-four years; no enjoyment of it, and no indication of a purpose to enjoy it. The old site has remained unimproved, and the claim to the easement exists, not as a right beneficial in its use to the plaintiff, but as a barren right which the plaintiff may interpose to the profitable use of the power by others.

But it was necessary to the plaintiff's position that he should make out a right of land with the easement as an appurtenance. This he has wholly failed to do. It is conceded that the two hundred feet square particularly described in the deed to Ketcham was not conveyed at all, and plaintiff relies now upon the conveyance of the mill *eo nomine*. No doubt if he had applied in equity for a correction of the deed, he might upon a proper showing have had it corrected and the land located, but he has been content to rely upon the grant of the mill as the principal; the dominant tene-

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ment to which the easement was attached; and he can claim at law nothing more.

Now without doubt a grant of a mill will carry the soil under it; and to that extent the Ketcham deed was effective. But a grant of a mill with an easement for its enjoyment is obviously a very different thing from a grant of land with an easement for its enjoyment for mill purposes. The latter may be made available at any time and by different mills in succession. But the grant of a particular mill with an easement for its enjoyment is a grant of the easement only so long as it can be used with the mill. The easement is appurtenant to the building, and when the building ceases to exist, the easement comes to an end; not by abandonment or extinguishment, but by the inherent limitation of the grant itself. We must suppose that this was the intention of the parties when in making the grant the one conveyed and the other was content to receive a conveyance of the mill only. "Such a grant, in its enjoyment, is as permanent only as the creation of which it is an incident, and necessarily as unstable. Like the natural phenomenon of the shadow cast by a substance, it vanishes when the substance disappears." It "must necessarily expire with the principal, and cease when that ceases." THOMPSON, J., in *Jessup v. Loucks* 55 Penn. St. 350, 362. It is like the grant of an easement to take water for a canal; it must cease when the canal ceases. *The National etc., Co. v. Donald* 4 H. & N. 8. The question therefore is not one of estoppel to the enjoyment of an easement, but of the existence of an easement; and the plaintiff fails because, upon his own evidence, the easement has terminated.

V. In the view taken of the case upon the last point, the tax titles become unimportant, and no expression of opinion will be made concerning their effect.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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PETER HACK, GEORGE HACK AND MARY TIBBITS v. PHILETUS W. NORRIS AND WILLIAM J. WATERMAN.

Appeals—Accounting for rents and profits—Interest on accounting.

Where no appeal is taken from a decree which determines all matters except an equity reserved for farther consideration and the only appeal is from a subsequent decretal order determining the reserved equity, the matters determined by the first decree are not open to review on the appeal from the decretal order.

Where the heirs of a grantor obtain a decree setting aside the deed, the accounting for rents and profits to which they may be entitled should date from the grantor's death when the heirs would have become entitled to the property; but if the deed was obtained by unconscionable means and the defendants purchased with notice, the accounting may properly begin at the date of the deed itself when the grantor came into possession and enjoyment of the property.

The rule of law whereby a liability for *mesne* profits is limited to the period of the statute of limitations does not necessarily apply to an accounting for rents and profits under a decree setting aside a deed, but as complainants are bound to do equity as a condition of relief the accounting may cover the entire period during which the defendant has held the property.

An accounting for rents and profits on one side and for taxes and necessary expenses on the other cannot be so allowed as to cover one period for one party and another for the other.

Where a commissioner was ordered on an accounting to compute the amount due with interest and the parties waived the computation of interest, there is no ground for an exception as to the allowance of interest.

Interest upon rents of property and the unpaid value of its annual use during such time as it is not rented is properly chargeable in a decree for an accounting against defendants who had obtained the property by unconscionable means and whose deed is vacated by the decree.

Appeal from Superior Court of Detroit. Submitted June 9. Decided October 12.

BILL to set aside deed. Defendants appeal. Affirmed.

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Charles M. Swift, Henry M. Campbell and *Geo. V. N. Lothrop* for complainants. A prior decree cannot be assailed on appeal from a later one: *Shepherd v. Rice* 38 Mich. 556; the vendees of a *non compos* are constructively trustees for him: (1 Story Eq. Jur. § 228; 1 Perry on Trusts § 189; *Price v. Berrington* 7 Hare Ch. 394); and bound to account for rents and profits: 1 Story Eq. Jur. § 511; 2 Perry on Trusts § 872; *Harding v. Handy* 11 Wh. 103; *Allore v. Jewell* 94 U. S. 506; *Tracey v. Sacket* 1 Ohio St. 54; *Rumph v. Abercrombie* 12 Ala. 64; *Whelan v. Whelan* 3 Cow. 537; and the accounting runs from the time when the title accrued: *Dormer v. Fortescue* 3 Atk. 129; *Hicks v. Sallitt* 3 De. G. M. & G. 782; and see *Eldred v. Ryerson* 27 Mich. 526.

Ward & Palmer and *Levi T. Griffin* for defendants.

GRAVES, J. The material facts stated in the bill are in substance as follows: Margaret Hack being the wife of Jacob Hack obtained a decree of divorce from him in the circuit court for the county of Wayne about the year 1859, and thereafter intermarried with Leopold E. Taufkirch, and lived with him as his wife until her death. That said marriage was however void by reason of a prior and subsisting marriage of said Taufkirch. That said Jacob Hack and Margaret Hack are both dead, the latter having died on the 26th of March, 1870, and that complainants are their sole issue and the only surviving heirs at law as well of the one as of the other. That on or prior to November 17, 1868, the said Margaret was the absolute owner in her own right of lots nine and ten in block four of the western addition to the city of Detroit of part of the Cass farm, and that said lots were worth about $10,000. That during the time she lived with Taufkirch he treated her with great brutality and held her under his absolute control. That his cruelty broke her down in body and mind and so completely that in July, 1868, she was attacked with softening of the brain and paralysis, and became wholly insane and incompetent to transact business. That on said 17th of November, 1868,

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said Margaret was living on the premises with said Taufkirch, and that he then took advantage of her helplessness and incompetency and coerced her to join him in executing a warranty deed thereof to the defendant Norris upon a consideration as expressed of $6500. That no part of said consideration was either paid to or received by her and that the deed was not her act, and that the defendant Norris was acquainted with all the facts. That possession was taken soon after by him and has since been retained by him and the defendant Waterman. That the latter on the 15th of June 1875, had full knowledge of the facts before mentioned affecting the validity of the transfer from said Margaret but nevertheless took a deed of the property from said Norris on that day. That complainants are informed that said Waterman paid nothing for said conveyance and received it merely for the purpose of facilitating a disposition by said Waterman (who is a real estate broker) for the benefit of Norris. That defendants have had the use and occupation since November 17, 1868, and have collected and received the rents amounting to a large sum and have not accounted therefor. That on the death of their mother, the said Margaret, the property descended to the complainants. The statements to excuse delay and the claims made for relief need not be noticed.

Such is the case made by the bill. The only matters in the answer which are now material are the denial of incompetency of complainants' mother, the allegation that the deed to Norris was in pursuance of an arrangement between her and Taufkirch to provide her with a separate living, the averment that whatever equity the complainants may have had originally had been lost by their laches, and that even if they should be held entitled to an accounting it ought not to be carried further back than six years next preceding the filing of the bill and in equity and justice should be confined to the six years next preceding the reference.

The parties went into evidence at great length and on the 19th of November, 1880, the cause was heard on the merits. The court, by a decree of that date, declared that the deed

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of November 17, 1868, to Norris, and the deed of June 15, 1875, from Norris to Waterman were void, and ordered an accounting by the defendants of the rents, profits and income collected and received by the defendants since the 17th of November, 1868, and of the amount to which complainants were entitled for the use and occupation of the premises subsequent to the same date. The decree further required that the commissioner should ascertain the amount laid out by the defendants for taxes, insurance, improvements and necessary repairs and other disbursements if any during said time, and also that he should compute the interest upon the balance due at the end of each year in favor of complainants and the rents, profits and income over and above the amounts in such year expended for taxes, insurance and necessary repairs and improvements and other disbursements if any, at the rate of seven per centum per annum compounded with annual rests to the date of the decree. All further directions were reserved.

This decree was not appealed from or otherwise disturbed. The parties acquiesced. It determined all matters except the equity reserved and such determination has come to be the law of the case. December 8, 1880, the commissioner filed his report. The parties waived the computation of interest directed by the decree and it was not made.

The defendants filed nine exceptions, and on the 4th of January, 1881, a hearing was had on the report and exceptions, and the court overruled the exceptions and confirmed the report except as found inconsistent with the final order then made. And the case is now before this court by appeal on the part of the defendants from this last order, a copy of which appears below.*

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*Superior Court of Detroit—*In Chancery.*

At a session of the Superior Court of Detroit, held at the Superior Court room in the city of Detroit, on the fourth day of January, A. D. one thousand eight hundred and eighty-one.

Present, the Hon. J. Logan Chipman, Judge of the Superior Court of Detroit.

Peter Hack, George Hack and Mary Tibbits, complainants, v. Philetus W. Norris and William J. Waterman, defendants.

This cause coming on to be heard at the last September term of said court, upon pleadings and proofs, and the court upon due consideration

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The first decree negatived the defence and by necessary consequence determined that complainants had not been guilty of any unconscionable laches or delay; and it decided further that the case made by the bill was established and that they were entitled to have the deeds set aside, to be put in possession and have an accounting. These matters are no longer open. They are beyond the power of this court. In view of the effect of that decree and of the state of the commissioner's report and the character and scope of the exceptions thereto and considering the shape and operation of the decretal order appealed from, there appear to remain only two subjects of inquiry: *first*, as to the right to carry the accounting back to November 17, 1868, the date of the conveyance by complainants' mother to defendant Norris; and *second*, as to the right to allow interest. Neither party has contended for beginning the accounting from March 26, 1870, the time when complainants' mother died, and hence

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thereof, having, at the November term of said court ordered, adjudged and decreed that the deed of conveyance purporting to have been executed by Leopold E. Taufkirch and Margaret, his wife, to the defendant, Philetus W. Norris, bearing date November 17th, 1868, purporting to convey the premises described in the bill of complaint, viz.: Lots number nine and ten, in block number four, of the western addition to the city of Detroit, of part of the Cass farm, according to the recorded plat thereof, said premises being situate on the south side of Larned street in the city of Detroit, county of Wayne, and State of Michigan; and also a conveyance of the same premises executed by Philetus W. Norris and Jane K. Norris, his wife, to the said William J. Waterman, bearing date June 15, 1875, were utterly void and of no effect; and having further ordered that the bill of complaint in this cause be referred to Harry F. Chipman, one of the circuit court commissioners in and for the county of Wayne, to take an account of the amounts of rents, profits, and income of every name and nature collected and received by said defendants, upon said premises, since the 17th day of November, A. D. 1868; also of the amounts to which the complainants are entitled for use and occupation of said premises since the 17th day of November, A. D. 1868; also of the amounts laid out by said defendants for taxes, insurance, and necessary repairs and improvements upon said premises, and other disbursements, if any, during said time; and further, to make certain computations of interest therein specified, further directions being reserved until the coming in of said report.

Upon reading the report of said commissioner heretofore filed in this cause, together with the several stipulations thereto attached, and defendants' exceptions thereto filed in this court, and after listening to the arguments of Charles M. Swift, solicitor for complainants, and John Ward, Esq., solicitor for defendants, it is ordered that the exceptions to the said report be overruled, and that said report be, and the same is, hereby in all things confirmed, except so far as the same may be inconsistent with this decree.

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the time when their title accrued. Both sides have obviously declined to adopt that view.

The position taken and adhered to by complainants, and which the court in making the decretal order accepted, is, that the accounting should commence at the date of the conveyance to Norris, a time some sixteen months prior to the acquirement of title by complainants. On the other hand the defendants claimed and still insist that it should begin not further back than six years preceding the reference or at the most six years preceding the filing of the bill. The parties are hence at variance as to which of these periods is the proper one; it being assumed obviously that one of them is so and that the date of Mrs. Hack's death ought to be excluded. And under these circumstances the court would naturally pause in any event before it would fix on this last-mentioned date as the proper limit. But whatever embarrassment on this score might have arisen, we think

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And upon consideration of the matters therein reported to this court, and upon further consideration of the pleadings and proofs, and after hearing further argument thereon by the said Charles M. Swift, Esq., solicitor for complainants, and John Ward, Esq., solicitor for the defendants, it is, by the court, now here ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree that complainants are entitled to recover of said defendant Norris, the full sum found by said report to have been received by said Norris for rents, and due for use and occupation of the said premises during his occupancy thereof, less the several sums found by said report to have been expended by him for taxes, insurance, necessary repairs, and improvements, and interest paid upon the mortgage executed by Margaret Taufkirch and Leopold, her husband, to Ira Davenport, dated April 4, 1863, together with interest on the several yearly balances in favor of complainants of the amount so received over and above the amounts so expended, at the rate of seven per centum per annum to the date of this decree; and that the complainants are entitled to recover of said defendant Waterman the full sum received by him for rents during the time said premises were occupied by him in the years 1875 and 1876, and from and after the first day of January, A. D. 1877, for use and occupation at the rate of forty dollars per month, to the date of this decree, less the several sums by him expended for taxes, insurance, necessary repairs, improvements, and interest upon said mortgage, together with interest on the several yearly balances in favor of the complainants of the amounts so received for rents, or to which the complainants are entitled for use and occupation over and above the sums so expended, at the rate of seven per centum per annum to the date of this decree. And reference to a circuit court commissioner to compute the several sums herein specified being waived by all parties in open court by their respective counsel, the court has thereupon computed the same upon the findings contained in the report of said Commissioner

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that the equities which spring from the circumstances are such as operate to refer the accounting to one of the periods contended for in argument and to show that the assumption that Mrs. Hack's death is not the proper time to reckon from is a correct assumption.

The principle on which complainants rely has been long settled. It was fully explained and variously applied long since. *Duke of Bolton v. Deane* Prec. in Chy. 516; *Bennet v. Whitehead* 2 P. Wms. 644; *Dormer v. Fortescue* 3 Atk. 124; *Norton v. Frecker* 1 Atk. 524; *Curtis v. Curtis* 2 Brown's Ch. R. 620. And in view of the determination made upon the facts, of which we have decisive proof in the first decree, it is entirely clear that complainants are by these authorities not only entitled to an accounting, but to one going back as far at least as their mother's death, and accordingly beyond the period contended for by defendants. The necessary meaning of that decree is that Norris got the estate from her by unconscionable means; that Waterman obtained it from him under circumstances exposing the title to the same objections to which it was liable in the hands of

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Chipman, and upon the basis of computation here declared, and said computations are contained in Schedule A, attached to this decree, and made a part thereof.

And thereupon it is ordered, adjudged and decreed that said complainants do recover of said defendant, Philetus W. Norris, the several sum and sums which as aforesaid they are entitled to recover, to-wit, the sum of $3046.78; and that said complainant do recover of said William J. Waterman the said several sum and sums which as aforesaid they are entitled to recover, to-wit, the sum of $2012.08; and that said complainants do have execution for all of said sums.

And it is further ordered, adjudged and decreed that said defendants, and all person or persons claiming by, through, or under them or either of them, do yield and deliver up to the said complainants, their several heirs, executors, administrators, representatives and assigns, possession of the premises herein described; and that defendants severally execute to said complainants, their heirs, executors, administrators, representatives or assigns, deeds of conveyance of the premises above described, releasing and forever quitclaiming unto said complainants, their heirs, executors, administrators, or assigns, all right, title, interest, claim or demand of said defendants in and to said premises; and it is further ordered, adjudged, and decreed that complainants do recover of said defendants their proper costs of suit to be taxed and to have execution therefor.

J. LOGAN CHIPMAN,
Judge of the Superior Court of Detroit.

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Norris; that the defendants knowing they had no right to the property yet withheld it under a claim of title they knew to be inequitable, and deprived Mrs. Hack of the use of it until her death, and thereafter deprived complainants of it. No milder meaning can be ascribed to that decree, and proceeding as we are bound to proceed on the basis of it, the extension of the accounting to Mrs. Hack's death at which time the complainants' title accrued is undoubtedly correct. The authorities are very positive. In addition to the ancient cases referred to, see *Hicks v. Sallitt* 27 E. L. & E. 212, 230, 236; *Russell v. Southard* 12 How. 139; *New Orleans v. Gaines* 15 Wall. 624, 634.

But as we have seen, the accounting was not limited to the beginning of their title. On the contrary it was carried back to the commencement of defendants' title, being some sixteen months prior to any title in complainants, and this would be incompetent unless under very unusual circumstances. But we have such circumstances and they apply not only to this consideration but to the argument that the time ought to be arbitrarily confined to six years by analogy to the rule at law in cases for mesne profits.

The complainants come to be relieved against the two deeds and to obtain the just emoluments of the estate, and they are bound to do equity as a condition of relief, and under this principle, as the court finds, the accounting ought to be extended beyond six years and to the date of defendants' title.

The defendants are entitled to allowances for improvements and expenditures, and these are found to have been so distributed over the different periods that no just and equitable settlement is practicable without including the whole interval subsequent to Mrs. Hack's death. Moreover the matters in regard to allowances to one party and another are so related and so intermingled in point of justice that an accounting on both sides is impracticable on any terms of equity without passing the limit of six years and going back to the beginning of Norris' title. And certainly no

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accounting could be allowed on one side merely for the whole or any particular portion of the time.

This branch of the case stands on special and peculiar grounds. *Neesom v. Clarkson* 4 Hare 97, presented a state of things somewhat similar and the right to prolong the accounting was sustained. Whether, in case the circumstances were not repugnant, the rule of limitation in respect to mesne profits in suits at common law would not apply by analogy, we do not inquire. On this part of the case we see no reason for disturbing the order appealed from.

The second point demands no special comment. We do not know what objections were made below or what are relied on here against the allowance of interest. The parties saw fit to take the subject away from the commissioner and hence nothing concerning it appears on which to found an exception, and of course no exception was tendered, and the sole suggestion made in this court is, that interest should not be allowed. We are not favored with any reason and are not able to conjecture any. The effect of the first decree was to establish a ground warranting the allowance of interest. The rents collected and the value of the annual use during such time as the property was not rented, together with interest, seem proper items in fixing the sums chargeable against defendants, considering the nature of their adjudged liability. *Vandevoort v. Gould* 36 N. Y. 639; *New Orleans v. Gaines* supra.

The result is that no cause is shown for disturbing the order and it must be affirmed with costs.

The other Justices concurred.

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JAMES H. CUDDY, ADM'R FOR JOHN KELLY v. SARAH HORN, OWNER OF THE STEAMER "GARLAND," AND WM. K. PARCHER ET AL., OWNERS OF THE STEAM YACHT "MAMIE."

Navigation—Passengers have no right to control public conveyances—Collisions—Joint liability for negligence—Limited Liability Act does not apply on streams connecting the lakes.

The rule by which one who rides in a private conveyance is presumed to control or be identified with the driver and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance.

The master of a vessel cannot relieve himself of responsibility for its safe management by surrendering its control to a charterer.

Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence.

Passengers on a steam-yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its owners for injuries caused them by the negligent management of those in charge of it.

An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable either jointly or severally.

If a passenger upon one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly, and it is for the jury to fix the liability where it belongs.

Where evidence tends to make out a case for the plaintiff, its force and effect is for the jury, and the Supreme Court will not attempt to review or weigh it.

The Limited Liability Act of Congress exempting ship-owners from personal liability for injuries caused by the negligence of those in charge of their vessels, does not apply to boats navigating streams connecting the Great Lakes.

Error to Superior Court of Detroit. Submitted June 14. Decided October 12.

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CASE. Plaintiff brings error. Reversed.

Alfred Russell, *James Caplis*, *Henry M. Campbell* and *H. M. Duffield* for plaintiff in error. The rule that a passenger cannot recover for injuries to which the driver of his conveyance contributed (*Thorogood v. Bryan* 8 C. B. 115; *Cattlin v. Hills* id. 123; *Prideaux v. Mineral Point* 43 Wis. 513; *Lake Shore, &c. R. R. v. Miller* 25 Mich. 274), does not apply to steam vessels which the passengers do not control: *Lockhart v. Lichtenthaler* 46 Penn. St. 151; or railway trains, *Flint & Pere Marquette Ry. v. Weir* 37 Mich. 111; *Chapman v. New Haven R. R.* 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. R.* 20 N. Y. 492; *Webster v. Hudson Riv. R. R.* 38 N. Y. 260; nor to street cars: *Bennett v. N. J. R. R.* 36 N. J. L. 225; nor stage coaches: *Turnpike Co. v. Stewart* 2 Metc. (Ky.) 119; nor tug boats: *Perry v. Lansing* 17 Hun 34; the doctrine is criticised in 1 Smith's Lead. Cas. 366; *Tuff v. Warman* 2 C. B. (N. S.) 750; *Waite v. N. E. Ry.* El. Bl. & E. 728; *The Milan* Lush. 403; *Hay v. La Neve* 2 Shaw Sc. App. 405; *Rigby v. Hewitt* 5 Exch. 240; *Greenland v. Chaplin* id. 243; and each case should be governed by its circumstances: *Daniels v. Clegg* 28 Mich. 40; *East Saginaw R. R. v. Bohn* 27 Mich. 503; the administrator of a person drowned by the collision of vessels has a right of action against the owners of both vessels: *Cooper v. E. T. Co.* 75 N. Y. 116; *The Washington and Gregory* 9 Wall. 513; *The Alabama and Game-cock* 92 U. S. 695; *The Atlas* 93 U. S. 302; *The New Philadelphia* 1 Black 62; *Sturgis v. Boyer* 24 How. 124; a private carrier of goods is liable for negligence: 2 Wait's Actions 6; a gratuitous steamboat passenger can recover for negligence: *New World v. King* 16 How. 469; so can a gratuitous railway passenger: *Railroad v. Derby* 14 How. 468; when there are doubtful or qualifying circumstances, the question of negligence must be left to the jury: *New Jersey &c. Transp. Co. v. West* 32 N. J. L. 91; *Weber v. N. Y. &c. R. R.* 58 N. Y. 451; *Ernst v. Hudson &c. R. R.* 35 N. Y. 9; *Thurber v. Harlem R. R.* 60 N.

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Y. 326; *West Chester R. R. v. McElwee* 67 Penn. St. 311; *Crissey v. Hestonville* 75 Penn. St. 83; *French v. Taunton R. R.* 116 Mass. 537; *Craig v. N. Y. &c. R. R.* 118 Mass. 431; *Carland v. Young* 119 Mass. 150; *Catawissa R. R. Co. v. Armstrong* 49 Penn. St. 186; *Taber v. Delaware &c. R. R. Co.* 71 N. Y. 489; *Hawley v. N. Central R. R.* 17 Hun 115; *Houston &c. R. R. v. Randall* 50 Tex. 254; *Johnson v. Bruner* 61 Penn. St. 58; whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury: *R. R. v. Stout* 17 Wall. 657; *Ireland v. O. H. & S. Plank Road Co.* 13 N. Y. 533; *Keller v. N. Y. C. R. R.* 24 How. 176; *McGrath v. Hudson &c. R. R.* 32 Barb. 144; *Gaynor v. Old Colony &c. R. R.* 100 Mass. 212; *State v. R. R.* 52 N. H. 529; *Beers v. Housatonuc R. R. Co.* 19 Conn. 566; *Vinton v. Schwab* 32 Vt. 612; *Penn. &c. Co. v. Bentley* 66 Penn. St. 30; *Stoddard v. St. Louis &c. R. R.* 65 Mo. 514; *Potter v. Chicago &c. R. R.* 46 Iowa 399; *Cumberland &c. Iron Co. v. Scally* 27 Md. 589; by whose fault a collision occurs is a question of fact: *Smith v. Condry* 1 How. 28; *Cooper v. Eastern Trans. Co.* 75 N. Y. 116; so is the existence of a chance of danger which will justify departure from the rules of navigation: *The Esther v. The Concordia* Holt's Rule of the Road 142; *The Amazon v. Osprey* id. 138; so is the risk of collision: *The Thames v. Stork* Jud. Com. P. C. 154; or whether the possibility of collision amounts to a risk: *The Newburgh v. The Oscar* Holt 233; so is the distance of the vessels apart: *Jane v. Great Eastern* Holt 170; and the rate of speed after approaching too closely: *The Milwaukee* Brown Adm. 313; *The Free State* id. 251: 91 U. S. 200; so is the fact of getting too near, as showing contributory negligence: *Kellogg v. N. Y. C. R. R.* 79 N. Y. 76; *R. R. Co. v. State* 45 Md. 229; *Lake v. Milliken* 62 Me. 40; *Haack v. Fearing* 5 Robert 528: 35 How. Pr. 459; *Sleath v. Wilson* 9 C. & P. 612; *Nav. Co. v. Hungerford* 6 G. & J. 291.

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Wisner & Speed and *John J. Speed* for defendant owner of the "Garland" cited *Armstrong v. Lancashire etc. R. R. Co.* L. R. 10 Exch. 47; *Houfe v. Fulton* 29 Wis. 296; *Carlisle et ux. v. Sheldon* 38 Vt. 440; *Forks Township v. King* 84 Penn. St. 230; *Payne v. C. etc. R. R. Co.* 39 Iowa 523; Cooley on Torts p. 684; as to joint liability for collision: *Colegrove v. Harlem & N. H. R. R.* 6 Duer 419.

Moore, Canfield & Warner and *H. H. Swan* for defendants owners of the "Mamie." A passenger who contracts directly with the charterer of a vessel, knowing him to be the charterer, must look to him and not to the owners: 1 Pars. Ship. & Adm. 125; *Clendaniel v. Tuckerman* 17 Barb. 184; *Tuckerman v. Brown* id. 191; *Baker v. Huckins* 5 Gray 596; *Colvin v. Newberry* 1 Cl. & F. 283; *Winterbottom v. Wright* 10 M. & W. 109; persons cannot be made jointly liable for negligence unless they are in the relation of master and servant, or act in concert: Campbell on Negligence 55; Bigelow on Torts 319; 2 Hilliard on Torts 297; *Guille v. Swan* 19 Johns. 382; *Wall v. Osborn* 12 Wend. 39; *Williams v. Sheldon* 10 Wend. 655; *Bard v. Yohn* 26 Penn. St. 482; *Weakly v. Royer* 3 Watts 460; *Brooks v. Ashburn* 9 Ga. 297; *Parsons v. Winchell* 5 Cush. 592; *Campbell v. Portland Sugar Co.* 62 Me. 552; *Yeazel v. Alexander* 58 Ill. 261; where each acts for himself they are not jointly liable: *Wood v. Cobb* 13 Allen 58; *Armstrong v. L. & Y. Railway Company* L. R. 10 Exch. 47: 12 Eng. 508.

Marston, C. J. The following statement of facts taken from the briefs of counsel for the defendants is sufficiently full and accurate for a definite understanding and discussion of the legal questions raised.

The action was commenced by the plaintiff as administrator of the estate of John Kelley, deceased, to recover damages on account of his death caused by a collision between the steamer "Garland," of which the defendant Horn was owner, and the steam-yacht "Mamie," owned by the other defendants, on the Detroit river, July 22d, 1880. The decla-

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ration alleged in substance that the Garland was going down the river upon a pleasure excursion, and the Mamie was coming up, returning from a pleasure excursion, and that Kelley was a passenger on the Mamie; that by failure of the master of the Garland to keep a proper lookout, and by his failure to give proper signals at the proper time upon the approach of said Mamie, as required by Rule 3 for the government of pilots, and by reason of the failure of the master of the Mamie to give the proper signals to indicate upon which side she would pass, until the vessels had approached so near that a collision was inevitable, and by reason of the failure of the owner and master of the Mamie to keep a proper lookout upon said Mamie, said vessels collided, and said Mamie sank, causing the death by drowning of said Kelley.

The defendant Horn and the other defendants filed separate pleas of the general issue. The owners of the Mamie also filed a plea in abatement, alleging that proceedings had been commenced and were then pending in the district court of the United States by them as owners of the Mamie for the purpose of taking advantage of the statute of the United States limiting the liability of vessel-owners in certain cases. And special notice of such proceedings was also given with the plea of the general issue.

A trial was had upon this plea, and a verdict, by direction of the court, rendered for the plaintiff thereon, and the trial thereupon proceeded upon the pleas of the general issue, and a verdict was rendered in favor of the defendants. The case comes here on writ of error, and the points relied upon by the defendants will be considered in order.

The position taken by the defendant Horn was, that the plaintiff's intestate was a passenger on the Mamie at the time of the alleged collision, and the Mamie having contributed to the collision, plaintiff's intestate must, in law, be held to have been so identified with those in charge of the yacht that he could not have recovered if he had survived, for an injury suffered by him occasioned by such collision, and that under the terms of the chartering or hiring of the yacht he could not have recovered for an injury so received.

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It appeared that Rev. A. F. Bleyenberg had chartered the steam-yacht Mamie to carry a party of altar boys and others, twenty-one persons in all, and fourteen of them from eleven to fifteen years of age, from Detroit to Monroe and back, for which he was to pay twenty dollars, and that the yacht was in charge of the master and engineer thereof placed there by the owners. At the time of chartering the yacht it was stated that there would be about twenty persons to go on the trip, but no limit was placed upon the number, or as to the particular route to be taken, in going to and returning from Monroe.

It has not been and could not be claimed that young Kelley had any authority or control whatever over the master or engineer of the yacht, or that he could have changed or directed the movements of the yacht in even the slightest degree. And while Father Bleyenberg, undoubtedly, we may assume, could and did have charge and control of the yacht, as to the time of starting, the number of passengers and such like, yet as to the due and proper management of the vessel, the steam she should carry, the speed at which she should be run, the course she should take within certain limits, the rules she should observe in meeting and passing other vessels, the lights she should carry, in a word the laws and rules applicable to such craft while navigating the rivers and lakes, were matters over which he could not rightfully be permitted to have any control or direction whatever. These were matters which the master of the vessel could not legitimately turn over to the guidance or direction of any person who may have chartered the boat for a trip to and from a certain point. Had directions been given the master to run the yacht ashore, or upon a rock, or to run down upon and destroy a row-boat, or to not give or answer the necessary signals when approaching another vessel, or to not carry proper lights, clearly the master would have been under no obligations to obey such orders, and neither he nor the owners of the vessel could have justified such a departure from duty by setting up the authority or directions of Father

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Bleyenberg therefor. In this case it was the legal duty of the yacht to carry proper lights at night and to give and answer certain signals in due and proper time when approaching another vessel, and what the law had thus directed to be done could not be varied, changed or controlled by any person who may have chartered the vessel for the occasion. And where a person can rightfully have no voice or control, he cannot be held so identified with those in charge as to be considered a party to their negligence. It seems to me that any other rule would but point out the way to owners of vessels in which they could violate all rules and regulations adopted to insure the safety of passengers without incurring any liability to them therefor. The reason for holding a person riding in a private conveyance identified with the driver thereof, and therefore affected by the negligence of the latter, cannot fairly or justly be held applicable in cases like the present. In the case of a private conveyance the driver is under the control and directions of the passenger, and if not, the latter may well decline to entrust his safety farther in such conveyance. When, however, a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either, and whether he may have chartered such conveyance for a special purpose or not, yet for a faithful observance of the rules of law enacted for the running or navigation thereof, he cannot be held responsible, in a case like the present, where the master is not his servant and is not subject to his directions or authority.

The authorities cited by counsel for plaintiff in error and which decline to follow *Thorogood v. Bryan*, 8 C. B. 115, should be followed in the present case. The charterer in this case did not appoint the officers of the boat, but was himself, and those who accompanied him, under and subject to their power in the navigation of the vessel, and if they, thus controlling the movements of the Mamie while running, and representing the owners thereof, were guilty of negligence in the performance of their duties, those on

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board have a remedy for injuries suffered in consequence thereof. See also *Covington T. Co. v. Kelly* 11 Am. Rep. 24.

It was next insisted that there was no joint liability on the part of the defendants. This question is not free from embarrassment, and upon a trial the danger is that each defendant is interested in endeavoring to throw all the blame upon the other, and perhaps attempt to prove acts of negligence not set forth in the declaration. In opposition to this it may be said that negligence caused a collision by which plaintiff's intestate was killed and that a remedy is given by statute to recover damages therefor; that if separate actions are brought different juries may acquit all the defendants, and thus the plaintiff be defeated, although his right to recover be unquestioned. Where, therefore, such embarrassments are likely to arise upon the trial, and bearing in mind that the plaintiff is without fault and is entitled to recover—at least we must so consider in the discussion of this question—is not the plaintiff who has thus suffered the wrong entitled to a remedy, and that the difficulties and dangers are to be thrown upon those presumably in the wrong rather than upon him who was not in fault? If in either view injustice is likely to be done, should not the defendants assume or be charged with the risk? Is there, however, likely to be any injustice done in holding them jointly liable? I think not. The facts are likely to be fully brought out on such a trial; neither will be interested in keeping back anything tending to show that it was the other alone that was in fault, and we cannot assume that any wilfully false evidence will be given in the case. The facts are quite likely, therefore, to be fully presented to the jury, who can place the responsibility where it rightfully belongs, either by holding both liable, or holding one party liable and acquitting the other.

An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally. The injury done in this case resulted from a collision caused by the contemporaneous act of two separate wrong-doers, who, though not acting in concert, yet by their

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simultaneous wrongful acts put in motion the agencies which together caused a single injury; and for this the injured party could receive but a single compensation. "It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and, if by many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover." *Stone v. Dickinson* 5 Allen 31.

In *Colegrove v. New York etc. R. R.* 20 N. Y. 492, it was held that a passenger injured by a collision resulting from the concurrent negligence of two railroad corporations could maintain a joint action against both. *Cooper v. E. T. Co.* 75 N. Y. 116, was a case where death had resulted from a collision by two vessels, and an action against both jointly was maintained. In my opinion this action may be maintained against the owners of both vessels. *Hillman v. Newington* 57 Cal. ——: 23 Alb. Law J. 294.

It was next insisted that the case made by the plaintiff showed no fault or negligence on the part of the owners of the Mamie that would justify a verdict against them. The rule must now be considered as settled in this State that where the evidence tends to make out a case for the plaintiff, the force and effect thereof must be submitted to the jury, and that this court will not attempt to review or weigh it.

In a case like the present it would be dangerous in the extreme for this court to attempt to find the facts or to draw inferences from facts proven, or to attempt to say what might be considered an act of negligence or sufficient evidence thereof. In our opinion the case upon this point should have been submitted to the jury, and in view of the fact that there must be a new trial, it is better that this

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court should not enter upon a discussion of the facts which lead us to this conclusion.

It was also urged that this case came within the Limited Liability act of Congress and that the defendants, owners of the Mamie, were not personally liable. The learned judge before whom this cause was tried held that the Mamie did not fall within the provision of the United States statutes, citing in support thereof *Am. T. Co. v. Moore* 5 Mich. 368, and *The Mamie* 5 Fed. Rep. 813. We are of opinion that these cases fully covered this question, and that the view taken by the court below upon this point was correct.

As we have thus passed upon all the material questions raised, and are of opinion that the court erred upon the questions designated, the judgment will be reversed with costs and a new trial ordered.

The other Justice concurred.

Louis Quinnin v. Henricke Reimers.

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Land-titles—Acknowledgment of plats—Apportionment of deficiencies between lots.

Where both parties to a suit respecting lands trace title through conveyances made with reference to a recorded plat, it is immaterial that the plat was never properly acknowledged.

Where in platting a village it turns out that by mistake the blocks are not so long as the plat represents, the deficiency must be apportioned between the lots of the block according to their apparent size as shown by the map.

And this rule will be applied notwithstanding the explanations upon the plat state that all lots are of full size except those made fractional by a named street; it appearing that according to the plat such street made certain lots fractional, and such last-mentioned lots evidently being all the explanations intended to except.

Error to Saginaw. Submitted June 16. Decided Oct. 12.

Trespass. Defendant brings error. Reversed.

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Tarsney, Tennant & Weadock for plaintiff in error. An unacknowledged plat is not evidence: *Grand Rapids v. Hastings* 36 Mich. 122; deficiencies in village lots from the scale of the recorded plat should be apportioned among the lots in proportion to their size: *O'Brien v. McGrane* 27 Wis. 448; *Jones v. Kimble* 19 Wis. 429; *Moreland v. Page* 2 Ia. 147; *Newcomb v. Lewis* 31 Ia. 489; defective plats which have been afterwards recognized by deeds from the proprietors are made valid by Comp. L. § 472, (*Wayne County v. Miller* 31 Mich. 448) and if actually recorded may be used to identify the land described in the deed which refers to it: *Johnstone v. Scott* 11 Mich. 232.

E. Wilber for defendant in error.

Cooley, J. This is an action of trespass. The question involved is the true location of the boundary line between lots three and four of block fifty-nine of Hoyt's plat of East Saginaw. Objection was taken to the plat that it was not properly acknowledged; but as it appeared that the conveyances under which both parties claimed referred to and were made in reference to it, the objection has no force. *Johnstone v. Scott* 11 Mich. 232.

The principal controversy related to the proper construction of a paragraph in the explanations which were upon the map when executed. This was as follows: "Said lots are 60 feet in width and 120 feet in length with the exception of such lots as are made fractional by the plank road and the boundaries of said city as are here laid down on this map." To an understanding of what will be said it is necessary that a section of the map, including block 59, should be given.

It appears from this map that blocks 44 and 45 are full blocks of twelve lots each, and no indication is given by marks or apparent distances that any lots were meant to be fractional. West of block 44 is block 35 which corresponds to it exactly, and west of that is block 18, which in the same way is divided into twelve lots, apparently of uniform size, and at the westerly end of lot one, which corresponds to lot one on block 59, the width is expressed as being sixty feet.

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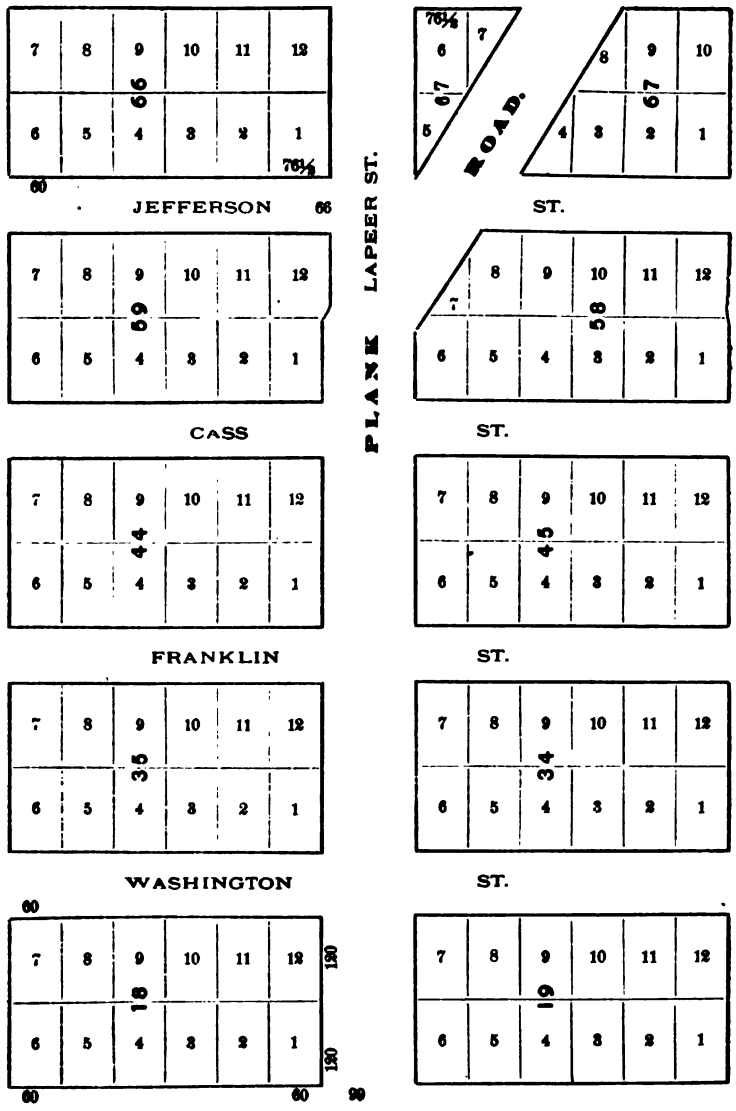
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It is thus made clear beyond question that in the survey and original platting blocks 18, 35 and 44 and the west half of block 59 were taken and supposed to be 360 feet in length, and that this supposed distance was intended to be divided by lot lines into six equal parts. The evidence tends to show, however, that the distance, instead of being 360 feet is but 352 or thereabouts; and there is consequently a shortage which must be lost by one or more of the lot-owners. The defendant contends that this shortage is to be equally apportioned between the six lots, while the plaintiff insists that it must fall exclusively upon the lots upon the plank-road, because such is the express provision of the explanatory note accompanying the plat.

The general rule is familiar that an apparent shortage like that which is met with here is not to be taken from any one lot, but is to be apportioned among all according to the length of their lines as indicated by the survey. The principle is clearly stated in the leading case of *Moreland v. Page* 2 Iowa 139, 153: "Where on a line of the *same* survey, between remote corners, the whole length of which line is found to be variant from the length called for, in re-establishing lost intermediate monuments, as marking subdivisional tracts, we are not permitted to *presume* merely, that a variance arose from the defective survey of any *part;* but we must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the *whole* line, and distribute such variance between the several subdivisions of such line, in proportion to their respective lengths." This rule is so obviously just and reasonable, that surveyors are accustomed to apply it without question or doubt.

But it is said the rule cannot be applied to this case, because the plat expressly prescribes another, namely, that all the lots shall be of the uniform width of sixty feet except those on the plank-road; and that the effect is to throw all the shortage on the lots bordering upon that road. But the wording of the explanation is that the lots "are 60 feet in width and 120 feet in length, with the exception of *such lots*

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as are made fractional by the plank-road and the boundaries of said city as are here laid down on this map." We must search the meaning of these words with the map before us, and they should have effect, if possible, as the proprietor understood them when the plat was made. It is not necessarily implied from the words of the explanation that all the lots on the plank-road are fractional: it is only said that "such" as are made fractional by that road are not of uniform width and length with the others. We look to the plat, then, to see what lots are and what are not made fractional by that road. The plat shows that lot 12 of block 59, lots 7 and 8 of block 58, and lots 4, 5, 7, 8 and 9 of block 67 are made fractional by the plank-road, but there is no indication whatever that any other lot on those blocks was not of the uniform size of 60 by 120 feet. On the contrary the fact that all the blocks west of block 59 are divided off into lots of uniform size, and that the parallel lines which divide them are continued to the north and south middle line of block 59, is conclusive that the west half of block 59 was supposed to be divided into lots of uniform size also. And this must govern unless the explanatory note has the effect to make fractional lots of all which adjoin the plank-road.

To interpret the plat correctly we should place ourselves as nearly as possible in the position of the proprietor when he made it, and have its subdivisions before us as they were before him at that time. It does not appear that stakes or other monuments were planted to indicate lot lines, but if any had been placed along the west line of block 59, they must, in order to be true to the plat, have divided that line into six equal portions. If these monuments had been planted, they must have controlled, because they would have constituted the most conclusive and satisfactory explanation of the proprietor's intent in making the subdivision. But if the map shows with reasonable certainty that his intent was to make an equal subdivision, the absence of stakes is not very important. We must look at his work as he regarded it, and uphold the subdivisions which he by his

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plat then supposed he had made. By the plat the west line of block 59 was assumed to be 360 feet in length when it was really but 352 or thereabouts. But the plat divided it into six equal parts, and made no fractional lot on the plank-road. The proprietors must therefore abide by this equal division, and none of them has a right to insist on making a fraction where the proprietor made none. The shortage, in accordance with the familiar rule already referred to, must be equally apportioned between the six lots. *O'Brien v. McGrane* 27 Wis. 446.

This conclusion is different from that reached by the circuit judge, and so far as we can judge from this record, is likely to determine the controversy. But as the case must go back for a new trial, and it is possible there may still be disputed questions of fact to settle, it is proper to add that we discover no error in rulings of the circuit court which were complained of, except upon this main question.

The judgment must be reversed, with costs, and a new trial ordered.

MARSTON, C. J. and GRAVES, J. concurred.

CAMPBELL, J. It seems to me to be the plain meaning of the recitals on the plat that all of the lots not bounded on the plank-road should have the full measure of sixty feet, and that if this would not leave that width for the lot so bordering, then that lot should be treated as fractional. I cannot conceive any reason for leaving the width of the bulk of the lots to be determined in the future by measurements which could not be readily made, and which would be directly misleading. The construction claimed against the ruling below makes all of the lots, and not merely one, uncertain. I can see no reason why this course should be contemplated, and it does not appear to me the language used sustains it. The question being one of construction, it is not one on which it would be of service to discuss it at length.

I think the judgment should be affirmed.

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LORENZO EGGLESTON v. JACOB K. WAGNER.

Contract for sale of lands—Extension of time—Sufficiency of description—Acceptance.

An extension of time, in a proposal to sell, stands by itself, and is not the same as the contract of sale which is completed only by an acceptance of the proposal.

Where a party verbally directs his name to be attached to a contract, and it is done under his personal supervision, he is bound as if by his own signature.

The description of real property, in a contract for its sale, must so fit and comprehend it that it can be applied to the property intended and exclude all else, with the aid, at least, of extrinsic testimony which shall neither contradict nor add to it; and a conflict in the extrinsic evidence cannot establish its insufficiency under the Statute of Frauds.

The sufficiency, under the Statute of Frauds, of a description of land in a contract for its sale, is a question which arises on the face of the papers, and, *it seems*, should be settled by inspection thereof before the introduction of extrinsic evidence to connect the contract with any particular premises.

The existence of a contract is a question independent of circumstances that may excuse its performance.

There is no acceptance where a proposal to grant one thing is answered by an offer to close the matter and take another; or, when the proposal involves executory proceedings on each side, and the person to whom it is made couples with his acceptance conditions that essentially change the offer or materially vary its effect.

An offer and acceptance cannot of themselves constitute a contract unless the acceptance is absolute and unconditional, complies with the conditions of the proposal, and includes whatever undertaking, right or interest the proposal calls for; nor unless they correspond in regard to subject matter and the extent of the interest to be transferred.

One partner offered to sell out to another for a specified sum but afterwards bought out the other instead, though he gave him, at the same time, an extension of the offer to a fixed date. Meanwhile the business was carried on, old debts were paid and new ones contracted, and substantial changes occurred. *Held* that a tender, at the end of the time limited, of the amount stated in the offer, in payment for the interest then held by the partner who had made it, was not such an acceptance of the offer as would create a contract relation, as it amounted to a proposal to take more than was offered

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Error to Kalamazoo. Submitted June 17. Decided Oct. 12.

Assumpsit. Defendant brings error. Reversed.

Severens, Tryon & Ranney and *Dallas Boudeman* for plaintiff in error. A contract for the sale of lands must be complete enough to identify the property either by description, or by reference to some other writing that does describe it, and without parol evidence: *Clark v. Chamberlin* 112 Mass. 19; *Wright v. Weeks* 25 N. Y. 161; *Jordan v. Fay* 40 Me. 130; *Sheid v. Stamps* 2 Sneed 172; *Farwell v. Mather* 10 Allen 322; *Hagan v. Domestic S. M. Co.* 9 Hun 74; *King v. Wood* 7 Mo. 389; *Snyder v. Neefus* 53 Barb. 63; *Parkhurst v. Van Cortlandt* 1 Johns. Ch. 273; *Rollin v. Pickett* 2 Hill 553; *McGuire v. Stevens* 42 Miss. 724; *Holmes v. Evans* 48 Miss. 247; *Blagden v. Bradbear* 12 Ves. 466; *Abeel v. Radcliff* 13 Johns. 297; *Johnson v. Granger* 51 Tex. 42; *Barickman v. Kuykendall* 6 Blackf. 21; *Taney v. Bachtell* 9 Gill 210; *Dorsey v. Wayman* 6 Gill 65; 1 Greenl. Ev. § 268; 2 Kent's Com. 571; *Hall v. Soule* 11 Mich. 494; *Huntington v. Wellington* 12 Mich. 10; *James v. Muir* 33 Mich. 223; *McElroy v. Buck* 35 id. 434; land contracts must be signed by the parties or by some one authorized in writing: Comp. L. § 4694; *Hyde v. Cooper* 13 Rich. Eq. 250; Browne Stat. Frauds §§ 10–12.

O. W. Powers and *M. J. Smiley* for defendant in error. An offer, together with the acceptance if made before it is withdrawn, constitute a contract, and the acceptance is sufficient consideration: *People v. Taylor* 2 Mich. 250; *Thruston v. Thornton* 1 Cush. 91; *Kennaway v. Treleavan* 5 M. & W. 498; Chit. Cont. (3 Am. ed.) 78; 1 Pars. Cont. 449, 482; the description in a contract is sufficient if the property can be identified, and the subject matter may be shown by parol: Browne St. Frauds § 385; *Atwood v. Cobb* 16 Pick. 230; *Blake v. Doherty* 5 Wh. 359; *Tallman v. Franklin* 14 N. Y. 584.

Graves, J. Wagner brought this action to recover damages on account of Eggleston's alleged failure to convey his

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interest in certain real and personal property in pursuance, as claimed, of a contract therefor between the parties.

The case was brought to trial last February before a jury in the circuit court for the county of Kalamazoo and under the rulings on points of law a verdict was given in favor of Wagner for $9000. Several objections were taken on the part of Eggleston during the trial and he asks a re-examination on writ of error and bill of exceptions of a portion of them.

Before touching any of the questions of law some preparatory reference is expedient to certain facts and circumstances immediate and surrounding and many of which are not disputed. The parties in the latter part of the year 1878 formed a partnership at Kalamazoo for the purpose of carrying on what is called in the record the "Kalamazoo Spring & Axle Works." The style of the firm was "Eggleston, Wagner & Co.," but the seat of business together with the enterprise were distinguished by the trade-name of the "Kalamazoo Spring & Axle Works." A considerable amount of real and personal property was invested, but the capital put in by Wagner was somewhat less than what Eggleston furnished. The business soon expanded into pretty large proportions and turned out profitable. The parties were also partners in a business at Mishawaka in Indiana. May 19, 1879, Eggleston delivered to Wagner the following proposition in writing:

"KALAMAZOO SPRING & AXLE WORKS.
Office of Eggleston, Wagner & Co.
L. EGGLESTON, (Established 1870.)
J. K. WAGNER. KALAMAZOO, MICH., May 19, 1879.
Office and Works on Portage Street.

Mr. J. K. Wagner: SIR—I will sell you my entire rights, title and interest in the lands, buildings, stock, cash and accounts, and all assets whatever, belonging to the business of the Kalamazoo Spring & Axle Works, or standing in my name, and bought for the use of said business, for the sum of forty-two thousand dollars ($42,000)—*I will say forty thousand.* Provided, that you shall assume all liabili-

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ties and all warrants, orders, contracts, and guarantees made in the name of Eggleston, Wagner & Co., and all liabilities made in my name and for the use of said business.

LORENZO EGGLESTON. T."

This paper with the exception of the paragraph "I will say forty thousand," was in ink and was written at Eggleston's personal dictation and in his presence by Mr. Tuthill, a clerk of the firm. The excepted passage was interlined in pencil by Mr. Eggleston. At this time and during the succeeding forty-two days or up to July 1st, the subject-matter referred to in this paper was variable. The parties kept the business going, and considerable changes were necessarily incident to any progress in it.

June 9, 1879, it was mutually agreed that Wagner should retire from the firm, he being paid by Eggleston the money he had put in with interest at eight per cent., his salary $125 per month, and so much of the assets of the Mishawaka business as had been collected. The amount was then figured up by McCamly, a clerk of the firm, and he swears that the amount on the account of the business at Mishawaka was $323.12, and that to be paid on account of "spring business with interest and salary and Mishawaka business" made a total of $13,426.65 and that this sum was immediately paid by check.

Wagner admits that this "composed his whole interest in the business here" (at Kalamazoo) "and so much of the Mishawaka business as had then been collected in."

On the same day, McCamly, by Eggleston's personal direction and in his presence, endorsed on the paper of May 19th the following writing: "This offer is hereby confirmed and extended until July 1st, 1879. Business hereafter transacted to be upon this basis. Kalamazoo, Mich., June 9, 1879. L. EGGLESTON, per M." In regard to the actual circumstances under which this endorsement originated the evidence is discordant. Wagner swears that it formed a part of the agreement for his retirement and the relinquishment of his interest to Eggleston and was a part of the consideration he, Wagner, exacted. Eggleston and

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McCamly, however, testify that it was a distinct transaction. Their explanations are materially different.

Wagner testifies that Eggleston informed him on the 6th of June that if he would withdraw the money he had in the firm and eight per cent. interest and $125 per month, that he would extend the time to July 1st, and would sell his interest in the business for $40,000. That the subject was renewed on the 9th of June and that he, Wagner, then inquired of Eggleston if he would include in his proposition a settlement of the Mishawaka business so far as the assets had been collected, to which he replied affirmatively, and that the extension was made in the same interview and before he, Wagner, left the office, and that the paragraph in pencil was still in the original paper.

Eggleston testifies that up to the time of ascertaining and deciding on June 9th what sum was to be paid to Wagner for going out, nothing had been said about extending the time in case he would take out his money. That the subject was not mentioned until Wagner had received his check and had started to go out of the room. That he, Eggleston, then said he was sorry it had turned out as it had as he was in hopes Wagner would take the property, and asked him if it would do any good to extend the time. That Wagner replied that he did not know as it would as he had tried about everybody to get the money, and he asked if he, Eggleston, would make the price any less, to which the latter said he would not, but if Wagner would pay him $42,000 by July 1st he might have it. That Wagner went away and some time afterwards returned, but on the same day, and inquired of Eggleston if he would put that agreement on the back of the contract; to which the latter replied that he would, and immediately dictated to McCamly the matter contained in the endorsement. That he, Eggleston, did not himself sign it and that McCamly had no authority in writing to sign his name.

When produced on the trial the paper of the 19th of May had undergone some alteration. The paragraph in pencil

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had been rubbed out and the statement in ink of the sum to be paid had been reduced from $42,000 to $40,000.

Wagner testifies that Eggleston made the change on June 27th at his request, and that he explained the object to be to remove a seeming ambiguity.

Eggleston swears that some time after the 9th of June Wagner called and asked him if he would not make the price $40,000 and he refused, and that Wagner then requested him to rub off the pencil marks as it was rather ambiguous as it was; and he thereupon "rubbed it off partially and then Mr. Wagner took the rubber and rubbed it some more." That no change was made at that time in the amount specified in ink, and that the alteration from 42,000 to 40,000 in that part of the paper set down in ink was not done by him, Eggleston, or in his presence or by any one with his authority.

The testimony of McCamly tends to corroborate Eggleston in regard to these disputed matters. But under the charge given by the court it is to be inferred that the jury gave credence to Wagner's version.

June 30, 1879, Wagner called on Eggleston at his office and informed him that he "had come there with $40,000 in greenbacks to close up the trade" and produced the money and offered to count it but Eggleston waived it. At the same time Wagner produced a blank bill of sale from Eggleston to himself ready to be executed and delivered and three full covenant deeds running to himself from Eggleston and wife and ready to be executed, acknowledged and delivered. He held also and offered to execute and deliver his personal covenant to Eggleston assuming and agreeing to pay "all liabilities and all warrants, orders, contracts and guarantees made in the name of Eggleston, Wagner & Co. and all liabilities made in the name of said party for the use of said business of said Eggleston, Wagner & Co." All the papers bore date June 30, 1879. The deeds covered three separate parcels of land, one containing the shop buildings, and being on Portage street, north-west of the portage, the second not far distant on Jasper street, and the third further

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south and being on Portage street. There being no diagram, the want of uniformity in the references to these lands in the testimony prevents any separate tracing of them throughout the record.

The specified consideration in the respective deeds was $40,000, $1800 and $1500; that is to say, each deed contained one of these sums as the consideration. The bill of sale expressed $40,000 as the consideration and purported to transfer to Wagner "all and singular all rights, titles and interest in and to the lands, buildings, stock, cash, (in hand and in bonds) and all accounts, notes and drafts on hand or in course of collection, also my undivided one-half interest in and to the patent for the H. J. Gage bolster spring, and all *choses in action* and assets whatever belonging to the business of the Kalamazoo Spring & Axle Works, (Eggleston, Wagner & Co., proprietors,) or standing in my name and bought for the use of said business, and also all machinery, tools, coal, wood and each and every article used in and about the Kalamazoo Spring Works." A covenant to warrant and defend against all persons was inserted.

Wagner testifies that he displayed the money and these papers and told Eggleston he "wanted to close up the matter." That he handed the deeds to Eggleston who took them and laid them on the table and observed that "if there was only $40,000 we could not buy it,—could not do anything. It will take $60,000, certainly, nothing less." Wagner proceeds to explain what followed in these terms:

"I said what shall we do? This is the last day. I came here with the money expecting to close it up. Eggleston said he did not expect to do anything; said he, you must bring $60,000; I don't want any sharp business. I asked him whether he refused it or not. He said he did not refuse it, neither did he accept it. This he repeated several times, and he said that he did not want to be caught in the matter; and I told him that I did not intend to play sharp. I insisted to know what he wanted to do, and he said, I want the debts paid, and I said I will assume them by signing that paper; and he said that isn't paying them. Eggleston said he shouldn't sign any papers. I offered expressly to sign the paper assuming all liabilities of the concern.

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He said, Wagner, bring $60,000 and I think we can trade. I asked him if he wasn't going to accept the paper, and he said no, he couldn't do it, but if I would bring $60,000 we might trade. He said he would not sign the deeds. I offered to sign this paper to assume the debts."

The evidence of Mr. Wykoff who went with Wagner, is substantially to the same effect. Eggleston relates what occurred in this way:

"When they came in Wykoff said something like this: 'Here is your filthy lucre;' and they laid a bundle done up in a lap-robe on the table and Wagner said it was $40,000 and wanted me to count it, and I said it did not make much difference if it was $40,000 or $6,000. I said if they would add $20,000 to $25,000 we could probably fix it up. Wykoff said to Wagner, 'I thought this fixed it all up,' and I said it would take more than that. Wagner then produced some papers which he said were deeds, and I did not look at the deeds or papers, but said I did not want to sign them until we fixed up the other matters. Wagner said, 'I will assume them,' and I said, 'assuming them and paying them are two different things. I shan't refuse to sign the deeds when you come with money enough.' I told Wagner that since we had had the talk before, I had paid Stockbridge, Eggleston & Co. considerable on a liability to them, and that he, Wagner, must pay back the $13,000 which I had paid him when we settled. I had paid Stockbridge, Eggleston & Co. some $11,000 after the extension was made. He asked me how much of the liability had been paid, and I told him I couldn't tell without looking over the books, but if he would come down in the morning we would look them over. He was there about ten minutes."

It will be acknowledged that the papers of May 19th and June 9th, assuming that they emanated from Eggleston, amounted to nothing more than a proposal to sell and that if any contract of sale was ever perfected on their basis it was not until June 30th. It may be, and Wagner's evidence tends that way, that on June 9th the parties did contract that the existing proposal should not be withdrawn prior to July 1st and that Wagner's option might continue until that time. But if such was the fact it was a separate matter and subject to its own incidents and not the contract of purchase to arise on an acceptance of the proposal and which

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could be made only by such acceptance, and not by a continuance, or agreement to continue the proposal. The ground on which the action is laid is that by putting together the papers of May 19th and June 9th and Wagner's proceedings on June 30th in relation thereto, a contract of sale was immediately concluded between the parties, and that Eggleston by his conduct on the same occasion committed a breach of it.

The point first noticeable relates to Eggleston's connection with the writings of May 19th and June 9th. It is objected that he did not himself sign either of them; and that although they were in fact signed in his name and in his presence and by his order, yet as the authority of the person who performed the manual act of writing the name was only by parol and not in writing, the signature was not that of defendant in point of law and was not binding, and 2 Comp. L. § 4694 is cited. This position stands positively refuted by decisions of this court. *Just v. Wise* 42 Mich. 573; *Johnson v. Van Velsor* 43 Mich. 208–218.

It is true that the mechanical act of signing was the act of another; but it is equally true that it was the immediate dictate of the will of Eggleston and was performed under his actual personal supervision. The penman was as much his instrument in respect to the fact of signing as the pen itself would have been had he actually held it. The signature was substantially his own.

A further objection is that the proposal did not sufficiently describe the real estate to satisfy the statute of frauds. The general principle is not questioned. The degree of certainty with which the premises must be denoted is defined in many books, and the cases are extremely numerous in which the subject has been illustrated. They are not all harmonious. But they agree in this, that it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject-matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend

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the property which is the subject of the transaction; so that with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property.

The circumstance that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the statute. Whether the description answers the requirement of the statute is a question which occurs on the face of the papers and is naturally preliminary to the introduction of testimony to connect the contract with the property, and the decision of it would regularly seem to be required on an inspection of the documents and before the arrival of opportunity for any conflict of the kind referred to. Moreover, it would hardly be deemed reasonable to allow the validity of the written description to depend on the ability of a party to bring about a conflict in the outside testimony. In my judgment the proposal was not open to this objection. A few cases are cited as examples of the view which other courts have taken of the subject: *Tallman v. Franklin* 14 N. Y. 584; *Hurley v. Brown* 98 Mass. 545; *Scanlan v. Geddes* 112 Mass. 15; *Mead v. Parker* 115 Mass. 413; *Slater v. Smith* 117 Mass. 96; *White v. Hermann* 51 Ill. 243; *Nichols v. Johnson* 10 Conn. 192; *Colerick v. Hooper* 3 Ind. 316; *Waring v. Ayres* 40 N. Y. 357; *King v. Ruckman* 20 N. J. Eq. 316; *Ogilvie v. Foljambe* 3 Meriv. 53-60; *Bleakley v. Smith* 11 Sim. 150; *Owen v. Thomas* 3 Myl. & K. 353; *White v. Bradshaw* 13 E. L. & E. 296: 16 Jurist 738; *Stuart v. London & N. W. Ry. Co.* 10 E. L. & E. 57; *Commins v. Scott* L. R. 20 Eq. Cas. 11: 13 Eng. 576; *Barry v. Coombe* 1 Pet. 640; *Dobson v. Litton* 5 Coldw. 616.

Thus far the case is with the defendant in error. But a more formidable objection is now reached and it involves a question which is independent of the point just considered. The case does not distinguish it in a very clear way, but the exceptions cover it and an opinion upon it is necessary. The question is whether on the facts stated by Wagner and

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not controverted by Eggleston a contract of sale was actually constituted; or in other words whether the acts of Wagner on June 30th were in any such sense responsive to the offer from Eggleston as to bring the parties into the alleged contract relation. The existence of a contract is a question independent of circumstances which may excuse its performance, and as no contract could come into existence without an agreement of minds it becomes a vital consideration whether the proposal made by Eggleston and the acts of Wagner relied on as acceptance had reference to the same thing or things in the same sense. If in answer to a proposal to grant Black Acre a person replies that he is ready to close the matter and will take White Acre there is no acceptance. Neither is there an acceptance where executory proceedings on each side are involved in the proposal and the party professing to accept introduces a variance and formulates his adoption of the offer with conditions and qualifications which essentially alter some of the constituents or materially vary the effect. In such cases no contract is brought into existence. *Kyle v. Kavanagh* 103 Mass. 356; *Suydam v. Clark* 2 Sandf. 133; *Nat. Bank v. Hall* 101 U. S. 43; *Jordan v. Norton* 4 Mees. & W. 155; *Hussey v. Horne-Payne* 8 Ch. Div. 670; 25 Eng. 561; *Tilley v. County of Cook* 103 U. S. 155.

In order to convert a proposal into a promise the constituents of the acceptance tendered must comply with and conform to the conditions and exigencies of the proposal. The acceptance must be of that which is proposed and nothing else and must be absolute and unconditional. Whatever the proposal requires to fulfil and effectuate acceptance must be accomplished and the acceptance must include and carry with it whatever undertaking, right or interest the proposal calls for, and there must be an entire agreement between the proposal and acceptance in regard to the subject-matter and extent of interest to be contracted. If the parties do not refer to the same things in the same sense the transaction is simply one of proposals and counter proposals. Pollock's

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Principles of Contract ch. 1; Bishop on Contracts ch. 14; 1 Parsons Cont. b. 2 ch. 2 sec. ii.

The transactions relied on as amounting to a contract of sale must be tested by these principles. What would have been the effect if Wagner on June 30th had merely assented to the proposal is a question we are not required to consider. It may be that in that event the transactions would have been too uncertain to create any binding contract relations. Indeed it is probable that the parties failed to see and appreciate the incongruities which would naturally arise from any attempt to apply the scheme as drawn by the proposal, to new objects and interests and changed conditions.

We are to assume however for the purpose of the question which is presented, that a legitimate accession to the offer in accordance with its true sense, would, though given subsequent to material changes of interests and of circumstances, have brought into existence a practicable arrangement and one possessing the mutuality and certainty necessary for a valid contract. The first step is to identify the subject-matter with which the proposal dealt and to which it must be confined. The surrounding circumstances have been noticed. The parties were partners. Each owned an interest and each was accountable for liabilities. In this state of things Eggleston proposes to sell his interest to Wagner for $40,000, on the terms of an assumption by Wagner of all existing liabilities. This is on May 19th. Wagner does not accept, and both concur in pushing on the business and in bringing about substantial changes. Old debts are paid and new ones are made. The items of debt and credit are different and the debtors and creditors cease to be the same. There are variations in respect to the stock and tools and the interests are changed in point of value. On June 9th the parties concur in a much more radical change. Wagner sells out to Eggleston for some $13,000, and by the payment to Wagner of that sum Eggleston increases his interest to the same extent. Eggleston promises that the offer of May 19th shall continue up to July 1st and that subsequent business shall be transacted on that basis. Both

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understand that the business is not to be interrupted. Now the offer of May 19th was not an offer to sell future interests, but to sell such as Eggleston then held, and not on the terms of an assumption by Wagner of indefinite and uncertain future liabilities, but of ascertained liabilities then existing. Such was the transaction, and on June 9th the parties agreed that this identical proposal should remain open until July 1st. It is not pretended that any new proposal was made or agreed on. Having given Wagner an option to buy on certain terms such interest as he, Eggleston, held on the 19th of May, it was arranged to prolong such option until the 1st of July. There was no agreement to give time for Wagner to come in and accept an offer of a present or different interest. There was no such offer to be kept open. The writings and the surrounding facts are positive in their meaning that the original proposal applied to no interest except that which was held by Eggleston on May 19th, and that the arrangement allowing it to run until July 1st did not cause it to cover subsequent interests. From the 9th of June this original offer to sell the same interest Eggleston held on May 19th was an offer for every instant until the disagreement of the parties on June 30th, (*Boston & Maine R. R. v. Bartlett* 3 Cush. 225,) but no agreement was made to expand it. Such then was the offer and the only offer which Wagner had before him on June 30th.

Upon the question whether the circumstances relied on as constituting acceptance tallied with this offer or proposal, only a few words are necessary. Wagner tendered $40,000 and offered to assume certain debts and liabilities, and he required Eggleston to execute the deeds and bill of sale. These offers and requirements were put forth and are now urged as amounting to a perfect acceptance. It is needless to inquire whether Mrs. Eggleston's execution of the deeds could be called for, or whether he could be required to give the covenants which were inserted, or whether the covenant offered by Wagner applied to the same debts and liabilities contemplated by the proposal. The deeds and bill of sale together applied certainly to all the property pertaining to

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the concern and held by Eggleston on June 30th, and on the admitted facts they covered many thousand dollars of interest beyond the interest to which the proposal applied. The whole interest recently held by Wagner himself and amounting to $13,000 had been added.

Without referring to other points of probable disagreement between the proposal and the alleged acceptance, a clear illustration of the difference under notice is presented, by supposing the money price and the amount of interest to be equivalents; and the fact may then be described by saying that Eggleston offered to sell an interest of $40,000 and Wagner, under the name of acceptance of that offer, insisted upon being granted an interest of $53,000 and no less. The result is that the alleged acceptance was not an acceptance. In substance and effect it was an offer to accept upon terms varying from the proposal, and it produced no contract relation. *Nat. Bank v. Hall*, supra. See also the books on contracts referred to. I am not satisfied that the judge erred in allowing a reference as to the value of the good-will, but no further opinion is called for.

The judgment is reversed with costs, and a new trial ordered.

The other Justices concurred.

46	623
86	233
46	623
115	529
115	580

SAMUEL GOODSELL v. SILENCE MAY SEELEY, BY NEXT FRIEND.

Exceptions to charge—Compulsion of jury.

When exceptions are taken indiscriminately to every paragraph of the charge, they will be treated the same as if one general exception had been taken to the whole charge; and if any part of the charge is correct, the exceptions will be overruled.

After the jury had retired they returned into court and informed the judge that they had not agreed, but "stood eleven to one, and divided on $200." He thereupon told them "If that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small." *Held*, to be error.

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Error to Macomb. Submitted June 22. Decided Oct. 12.

CASE. Defendant brings error. Reversed.

Crocker & Hutchins for plaintiff in error. A suggestion from the court which operates as a constraint upon the jury is error: *Pierce v. Pierce* 38 Mich. 415; *State v. Bybee* 17 Kan. 462; *Slater v. Mead* 53 How. Pr. 57; *Green v. Telfair* 11 id. 260.

J. B. Eldredge for defendant in error. Urging the jury to come to an agreement is not error: *Allen v. Woodson* 50 Ga. 53; Thompson Charg. Jury, § 58.

COOLEY, J. The defendant in error, an infant, brought suit against Goodsell, who is a physician, for malpractice in setting her arm. Goodsell had treated the injury as a fracture of the humerus, but after two or three weeks it was discovered that there was a dislocation at the elbow, and another physician was called in, by whom the dislocation was properly treated. There was a fair question on the evidence whether Goodsell had been laboring under any mistake in his treatment; whether the fracture for which he treated the child had not existed in fact, and whether the child had not caused the dislocation by engaging in rough and violent sports while her arm was progressing favorably under the physician's treatment. The jury, however, found against him, and he brings error.

The printed record contains upwards of two hundred pages. Many exceptions are taken, some to the admission or rejection of evidence, but the majority to the instructions given or refused. I find no error in the rulings on evidence. The defendant offered in writing a number of requests for instructions, all of which were refused and the judge gave instructions which he evidently meant should cover the whole case. I think it proper to copy from the bill of exceptions the whole of these instructions, with the exceptions that were taken to them as there set forth:

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"The said circuit judge then on his own motion instructed the jury as follows, to-wit:

"There is no question made, in fact it is conceded, that the defendant was a professed and practicing physician and surgeon and that he held himself out to his neighbors and the country round about as a physician and surgeon. As such he undertook to treat the plaintiff when called to attend her, early in October, 1877, for an accident which had befallen her, resulting in an injury to her arm.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"And the plaintiff claims in her declaration she was not treated in a careful, skillful and proper manner, but that the doctor's treatment of her was negligent, careless and unskillful, and she claims to have sustained injury by reason of such careless, unskillful and improper treatment, and she seeks to recover of the defendant damages for the injury she has thus sustained; the doctor denies that he has so treated her.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"The plaintiff's case must be made out by a fair preponderance of proof, and all I can do to aid you in determining this matter is to give you such few general rules relative to the duties and obligations of the doctor as the law has prescribed, and these being given you, the facts in the light of these legal rules are for you to determine.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"1st. Then there was an implied promise on the part of the doctor that he himself possessed that reasonable degree of learning, skill and experience which is ordinarily possessed by members of the medical profession, and which is ordinarily regarded by the community and by those conversant with the profession as necessary and sufficient to qualify him to engage in the business.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"2d. The doctor undertook and promised impliedly, at least, to use reasonable and ordinary care and diligence and his best judgment in the exertion of his skill and the appli-

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cation of his knowledge to accomplish the purpose for which he was employed. In determining what is ordinary skill, regard must be had to the improvements and advanced state of the profession at the time the patient was treated.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"If you shall conclude from all the evidence that this defendant did not use ordinary skill, care and diligence, and that damage has resulted to the girl on account of such want of ordinary skill, care and diligence, then you should find for the plaintiff; but if you conclude that the doctor did use ordinary skill, care and diligence in his treatment of the injury, then you should find for the defendant.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"And if the injury to the plaintiff resulted from any other cause than the cause alleged in this case, as, for instance, from an accident after defendant's care of the girl ceased, then, of course, the defendant is not liable; or, in other words, if the plaintiff recover, it must be for the cause alleged in the declaration, and not for any other or different cause.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"If you shall conclude that the plaintiff is entitled to a verdict, the amount will be such fair and reasonable sum not exceeding $5000, that being the amount claimed in the declaration, as will fairly compensate the plaintiff for her suffering, and the injury done her; and in determining the amount, you will take into account all that has been permitted to go to you by way of evidence. I do not choose to magnify any particular fact, but each and all are for you to consider.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"The case is not one to be determined by sympathy or pity for one side or the other.

"To which opinion and instruction the counsel for the defendant did then and there except.

"The said circuit judge further instructed the said jury:

"If the doctor, in his treatment of the girl, exercised reasonable and ordinary care, skill and diligence, he has

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done all that the law requires of him; if he has done less than this he is liable for the damages resulting.

"To which opinion and instruction the counsel for the defendant did then and there except."

One has but to glance at the several paragraphs of the instructions as they are here excepted to, to discover that some of them are mere statements of fact, others the statements of principles which no one does or can dispute, while a number are instructions distinctly in the defendant's favor. Yet indiscriminately they are all excepted to, and errors of law are assigned upon them. Thus excepted to they become a part of the printed record from which the defendant in error is to hunt out the faults which he may infer or guess the plaintiff in error will rely upon. The judges also, when they receive such a record, must guess out as best they may what it is in the rulings of the court that is supposed to constitute substantial error. Thus the purpose of the exceptions and assignments of error, which is to bring distinctly to the mind of counsel and court the supposed faults, is wholly defeated. And if the court in charging the jury inadvertently fell into error, this method of indiscriminate objection was well calculated to prevent his making the discovery. The practice is unfair to the trial judge and to the opposing counsel, and imposes unnecessary labor upon the appellate court. I do not think the plaintiff in error is entitled to any further benefit of such exceptions than he would have been from one general exception to the whole charge; and in such a case if any part of the charge is correct the exception fails.

The judge, however, did commit an error subsequent to the charge, of which the plaintiff in error is at liberty to take advantage. The record states that after the jury had been absent for a time they came in and stated "they had not agreed, but stood eleven to one and divided on $200." The judge in reply told them "If that is the only difference it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when

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the difference is so small," and he asked them, to get together if possible.

It is no doubt true that juries often compromise in the way here suggested, and that by "splitting differences," they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery. It was no doubt very desirable to the public and to the parties that the jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties; but not otherwise.

The judgment must be reversed, with costs, and a new trial ordered. The condition of the record is such that we feel warranted in directing that, in taxing the costs, only one-half the cost of printing the record shall be allowed.

The other Justices concurred.

ALEXANDER R. LINN ET AL. v. BAXTER A. GILMAN.

Account stated—Settlement with employee for expenses—Offers of testimony—Incompetency of evidence as to private expenditures.

A commercial traveler was sued by the firm who employed him as for money which they claimed to have overpaid him in refunding his traveling expenses, which they were in the habit of doing on reports which he presented, and which, in their declaration, they allege to have been false. Plaintiffs filed a bill of particulars of the debit items against the defendant, which the latter admitted. *Held*, that as one of the plaintiffs admitted that the matter to which defendant's admission referred had gone into an account stated the plaintiffs were bound by this admission, and, as there was no legal evidence of fraud, the plaintiffs were not entitled to recover on the strength of defendant's admission of the items set forth.

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In an action by a firm of merchants against their traveling man to recover money overpaid to him in refunding his traveling expenses, the action being based on the theory that he had reported his expenses as larger than they actually were, it was not error to exclude evidence of the actual expenses of other traveling men over the same route in the same years, and that they were much less than were charged by defendant. Such matters are *res inter alios acta*, and if the circumstances are not identical they cannot be relevant.

The statement of what it is proposed to show in making an offer of testimony, is assumed to include all that is meant to be shown in addition to what has been already submitted, and if what is offered, though taken in connection with the evidence previously given, is incompetent to establish the main fact, it is proper to exclude the testimony.

An offer of testimony must, in a review of the case, be considered as it was made, and no facts not expressed or clearly implied can be intended.

In an action by employers against an employee for money claimed by the plaintiffs to have been paid him on false statements of his account against them, testimony to show that defendant has expended more than his salary besides supporting his family, and that he had no other source of revenue, is properly excluded, as there can be no presumption that he has wrongfully obtained so much as was not paid him in wages.

Error to Superior Court of Detroit. Submitted June 22. Decided October 12.

Assumpsit. Plaintiff brings error. Affirmed.

Atkinson & Atkinson for plaintiffs in error. Accounts stated may be attacked for fraud or mistake: *Wiggins v. Burkham* 10 Wal. 129; *Lockwood v. Thorne* 1 Kern. 170; *Philips v. Belden* 2 Edw. Ch. 1; *Rich v. Eldredge* 42 N. H. 153; and an agent who has presented an account to his employer cannot impute neglect to the latter in paying it: *Beaumont v. Boultbee* 5 Ves. 485.

Griffin, Dickinson, Thurber & Hosmer for defendant in error.

Graves, J. Some account of the origin of this controversy and of its character, is necessary at the outset. The plaintiffs were wholesale grocers at Detroit and in January,

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1871, they hired the defendant, Gilman, as an agent to travel for them and make sales and collections. He was to receive a salary and have his expenses borne. He continued until the year 1878 but the terms underwent variation. The particulars are not now important. The course pursued by mutual acquiescence and assent was for the defendant to make trips occupying a few days and on his return report a gross sum as paid for expenses and hand over the remainder. About the middle of 1875 the plaintiffs informed him that his expenses were regarded as too large, and in the next year they footed up a little less. The course pursued amounted to a practical liquidation of the accounts from time to time and their accuracy was not disputed during the employment. The plaintiffs neither called for any revision of the charges nor suggested the least suspicion against their integrity. The ground of complaint in 1875 was that the expense actually incurred was higher than the plaintiffs were willing to bear and not that it was being, or had been, falsely represented above the true amount. If the objection at that time had been for the reason last mentioned the plaintiffs would have dismissed the defendant at once instead of retaining him as they did in the same place of trust and confidence.

In 1879 and after the employment was ended the plaintiffs set up a claim. It was not put on the ground of mistake, nor on the ground that the real expense had been grossly extravagant and unreasonable. It was not pretended that the cause of what was complained of was high and reckless living or wanton failure to scale down and correct the bills at public houses and elsewhere. But the precise foundation of the claim was that in giving in his several reports of trip expenses the defendant had falsely and fraudulently swelled the amounts by fictitious additions to the actual expenditures —that he had obtained credit for moneys on the pretence of having expended them for traveling purposes, whereas he well knew he had not expended them at all.

To enforce this claim, to establish this fraud and recover its alleged fruits, the plaintiffs brought this action. The

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defendant pleaded the general issue with notice of set-off, and the plaintiffs filed a bill of particulars apparently covering all the debit items of whatever nature against the defendant and amounting in the aggregate to nearly $20,000.

The trial came on and the record states that "to maintain the plaintiffs' case the defendant's counsel admitted the items charged in the bill of particulars, reserving the right to cross-examine the plaintiff as to them, and for that purpose William F. Linn, one of the plaintiffs, was called and testified as follows"—and succeeding this statement, the record shows an elaborate examination of this witness by questions and answers, many of the questions being by plaintiffs' counsel. Still pursuing the record, the next proceedings are as follows:

"The plaintiffs' counsel then produced as witnesses a number of persons engaged as traveling men, upon the route mentioned, and proposed to show by said witnesses, what the actual expenses in traveling that route are, for the different years in question in this suit," and the proposition was rejected. "Plaintiffs' counsel proposed to show by several merchants, whom he produced as witnesses, that they were well acquainted with the expenses of traveling men over the route traveled by the defendant, and for the years in question, and that the expenses of traveling men are much less than the expenses charged by the defendant," and this was refused. "Plaintiffs' counsel then produced witnesses by whom he proposed to show that the defendant had, during all these years, earned about twelve thousand dollars, and that he had made investments, and paid for property about fourteen thousand dollars, besides supporting his family. That he had no other source of revenue," and the court excluded it. "Plaintiffs' counsel then produced witnesses who had estimated the cost of railroad fare, hotel bills, 'bus fare, livery bills and other expenses on the route traveled by the defendant, and proposed to show by them that the expenses charged by the defendant could not possibly have been legitimately expended," and this was likewise denied.

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No other witnesses were called and the court ordered a verdict for the defendant.

The point to be first noticed is the allegation that error was committed in directing a verdict against the plaintiffs. It is said that in the actual state of the evidence they were entitled to recover on the admission made by defendant of the items in the bill of particulars. This position is not tenable. The admissions by the plaintiff when on the stand were conclusive against him and his brother in this action, that the matters in the bill to which the admission of defendant referred had gone into accounts stated: *White v. Campbell* 25 Mich. 463, and on the plaintiffs' theory that the vice in the transactions consisted of the false pretences that the money had been paid for expenses when in truth it had not been, there was no case for the jury. The allegation of the fraud was without legal evidence to countenance it.

The next question is whether the court erred in denying the offer to show what the actual expenses of other traveling men had been over the same route, in the same years, and that they were much less than were charged by defendant. The purpose and only purpose of the proposed evidence, must have been to induce the jury to accept the difference between the defendant's expense-account and the expenses of third persons going as agents along the same general route and in the same years, as a fact tending to show that the defendant wilfully inflamed his own statements of expense by adding sums as expended which were not expended at all.

That collateral facts are often relevant and proper will not be denied. But it is always necessary to regard their relation to the question to be settled. There must always be some known and ordinary connection between the facts proposed and the facts to be proved, and the former must have some fair tendency to establish the truth of the latter, and when the collateral facts consist of the conduct of strangers the law usually applies the maxim of *res inter alios acta*, because there is no such general connection between such acts and

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the matters to be established as will justify an inference such as may properly be relied on in judicial investigations.

But whether these foreign facts are or are not the acts of strangers, if they are incapable of affording any reasonable presumption or inference as to the final subject, they ought not to be admitted. They are likely to lead to the multiplication of issues and to cause confusion and misjudgment. 1 Greenl. Ev. § 52; 1 Starkie pp. 79, 80, 81, 82; Stephen art. 10.

Illustrations of the doctrine referred to are numerous. The following citations are among them: *Holcombe v. Hewson* 2 Campb. 391; *Jackson v. Smith* 7 Cow. 717; *Wilmot v. Richardson* 6 Duer 328; *Murray v. Smith* 1 Duer 412; *Lewis v. Smith* 107 Mass. 334; *Aldrich v. Inhabitants of Pelham* 1 Gray 510; *Collins v. Inhabitants of Dorchester* 6 Cush. 396; *Lincoln v. Taunton Manuf'g Co.* 9 Allen 181; *Gouge v. Roberts* 53 N. Y. 619; *Lake v. Clark* 97 Mass. 346; *Odiorne v. Winkley* 2 Gall. 51–53; *Brewster v. Dennis* 21 Pick. 237; *Ferneaux v. Hutchins* Cowper 807.

In the present case the offer of evidence was open to all the objections alluded to. It came within the description of *res inter alios acta*, and was also subject to the exception that the facts proposed would not possess the properties in reason to generate the inference called for. The proposition was to compare one state of things with another and to prove thereby that a feature in one was false; but unless they were agreed in those points constituting the premises the comparison would be futile. If the circumstances were not substantially the same the experience of others in regard to the expense of traveling would be a fallacious test of the expense the defendant made, and the establishment of this needed similarity was not provided for nor even possible. It is too plain to be questioned that no such similarity of conditions was to be developed or could be, as would afford any reasonable basis for inferring or contending that the alleged overcharges were false, and that they represented expenditures which were never made. The offer did not and could not contemplate such a generalization of incidents, including

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carriage hire and extra excursions however prudent or imprudent; a style of living however frugal or extravagant; and a degree of personal care or indifference in regard to the size of bills rendered, as would afford a jury any just criterion whatever.

The identity of circumstances to make the analogy valid was impossible of proof, and the points of agreement were not such as to authorize any valid inference in respect to the point of supposed disagreement.

The last question arises on the refusal of the plaintiffs' offer to show that during the years in question the defendant earned only about $12,000 and had no other source of revenue, but invested and paid for property about $14,000 besides supporting his family. This proposition was made of course upon the theory that the facts proposed to be proved would tend to show if established that the defendant swindled the plaintiffs by falsifying his account of expenses as alleged, and unless in view of the state of facts at the time the offer was denied, such must have been the legal tendency, the ruling was correct. The description given in an offer of testimony of what is proposed to be shown is assumed to include all that is intended to be shown in addition to what has been already submitted, and when what is offered, though viewed in connection with the evidence previously given, is incompetent to establish the main fact, it is correct practice to exclude it. The court is not bound to spend its time in an inquiry which on the tacit admission of the party can produce no reasonable result.

The offer in question must stand as made. Nothing can be supplied. No incidents can be added. No facts affirmative or negative which are not expressed or clearly implied can be intended. Suppose the facts to have been proved, what were they? That the defendant earned $12,000, and invested $14,000 besides supporting his family. That he had no other *source of revenue*. There was no offer to show that his property was *limited to his earnings*, and it would be absurd to say that because a man's *revenue* is con-

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fined to his earnings it follows or is to be inferred that he has no other lawful possessions.

For aught that was shown or offered it may be supposed that the defendant was provided lawfully with sufficient means to make up all he used over and above his earnings, and such would be the presumption of law until the appearance of a state of facts inconsistent with it. It would be very irrational to conclude that because a man was found to have invested an amount beyond his income, he probably obtained the excess in an illegitimate way, not to say one tainted with criminality.

Then as to the expense of his family. There was no offer to show the size of his family, or the expenditure on account of it, and much less what it cost him. No facts were adduced to establish that any portion of the weight of family support finally fell upon him, or if it did that as a legal probability the amount or any portion of it was drawn from the plaintiffs. The premises contained in the offer were wholly insufficient to lead to any relevant inference. Important conditions were wanting. The proposed facts, then, could have availed nothing had they been proved. They would have afforded no legitimate basis for any inference in favor of the plaintiffs' case.

It is proper to add that we wish it not to be implied from this criticism that the offer would have been good if it had contained all necessary requirements of form. On the contrary we regard it as far from certain that it would have been, but no decision on the subject is now called for.

We are of opinion that no error was committed, and that the judgment should be affirmed with costs.

The other Justices concurred.

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HERMAN KIEFER, AUGUST F. DIEDERICH AND BERNARD STROH v. THE GERMAN AMERICAN SEMINARY OF THE CITY OF DETROIT.

Governmental donation of lands for educational purposes.

A grant of land was made by the State to an educational corporation, and by the grant it was provided that the proceeds should be devoted exclusively to the erection of buildings for the use of the corporation. A bond was given by individuals to the State to secure the performance of this provision. By consolidation with another corporation the donee secured all the buildings it needed, and afterwards appropriated the proceeds of the lands to its general needs. The sureties in the bond to the State then filed a bill to restrain the misappropriation. *Held*, that the bill should not be sustained.

The design of the donation was to secure to the donee buildings for its corporate use; and if the corporation secured all it needed, it would be immaterial that they were secured by the donation of friends, or by the use of moneys before in its possession, instead of using the precise moneys received on sale of the lands. And it is equally immaterial that the buildings were obtained without the use of any moneys.

The State intended its donation to be beneficial; and it is not to be presumed that it would present to the donee under any circumstances the alternative of expending the donation in useless buildings or forfeiting it. The State had a particular benefit in view, and is interested only in seeing that that benefit is secured.

Appeal from Superior Court of Detroit. Submitted June 23. Decided October 12.

BILL for accounting for moneys received; for the appointment of a receiver, etc. Defendant appeals. Bill dismissed.

Otto Kirchner for complainant. Where the strict execution of a trust is possible, the *cy pres* doctrine is inapplicable: Perry on Trusts § 733; Boyle's Law of Charities 150; or where the trust requires that the fund shall be forever applied as presented: *Atty. Gen. v. Ironmongers' Co.* 2 Myl. & K. 576; a surety may, by bill in equity, compel a debtor

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to pay his debt and *a fortiori* compel a trustee to execute his trust: *Hayes v. Ward* 4 Johns. Ch. 132; *Ranelaugh v. Hayes* 1 Vern. 189; *Barnesley v. Powel* 1 Ves. 283; *Flight v. Cook* 2 Ves. 619; *Champion v. Brown* 6 Johns. Ch. 398; *Lee v. Rook* Mosely 318.

C. A. Kent for defendant. Considerable latitude is allowed in the construction of charitable bequests. 2 Perry on Trusts § 723 *et seq.*

COOLEY, J. This is an equity case heard on pleadings and facts stipulated. The facts are as follows:

By an act approved March 15, 1861, the Legislature of the State granted to the defendant 25,000 acres of State swamp lands to aid the defendant in erecting buildings for its use. The lands were to be selected by defendant and conveyed to it, but the act contained a proviso "That if said seminary shall fail to erect buildings, in pursuance of the terms of the lease or grant made by the city of Detroit of land to said seminary, and within the time therein mentioned, said seminary shall in such event forfeit the swamp land, by this act granted, to the State of Michigan, and the same shall absolutely and forever revert to the State, against all and every person claiming to hold the same or any part thereof, and the patent or deed issued by the State of said lands shall state in substance this proviso of forfeiture." Laws 1861 p. 283. By an amendatory act passed in 1863 this proviso was changed so as to read as follows: "That before the issuing of the patents or conveyance, the trustees of said seminary shall deposit with the State treasurer a bond to the people of this State, with sufficient security, to be approved by the State treasurer, in the sum of twenty-five thousand dollars conditioned that the net proceeds of the sales of said lands shall be faithfully and forever applied to the purposes contemplated in this grant." Laws 1863 p. 59.

The bond provided for by this act was given by defendant, and complainants became the sureties therein. The lands granted were duly selected, patented to and the most of them sold by defendant, and the sum of $16,205.34 real-

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ized therefrom. In April, 1864, while defendant was without buildings for its use, it was consolidated with the German-English school of Detroit, and received therefrom a school building and lot of the value of ten thousand dollars, to which defendant three years later made additions at a cost of ten thousand dollars, and since that time has expended in repairs and improvements the sum of five thousand five hundred dollars. Of the sums realized from the sale of swamp lands defendant has expended $2123.96 for buildings and repairs, $3726.53 for taxes, insurance and legal expenses, and $6954.85 for stationery, books, school utensils and teachers' salaries, and claims a right to expend any sum so received for the current expenses of its school.

The bill, to protect complainants against liability as sureties on the bond so given to the State, prays for an accounting by defendant of the moneys received from sales of said swamp lands, and that defendant may be enjoined from making use of any of such moneys for any purpose whatsoever except for the purpose of aiding the defendant to erect buildings for its use and occupancy.

It is admitted by the stipulation that the school buildings of defendant are now in a good state of repair, and as large as the wants of the school require.

On these facts the court of chancery granted decree in favor of complainants as prayed.

It is objected to this decree that, on the theory of the bill, the swamp lands were conveyed to the defendant in trust, and the bill seeks to compel the execution of the trust. But the conveyance of the land to defendant was for its own benefit, so that if the conveyance was charged with a trust defendant was both *cestui que trust* and trustee, which is impossible. *Bolles v. State Trust Co.* 27 N. J. Eq. 308. In such a case, it is said, if the fund donated is not applied according to the directions of the donor, there can be no redress, for the donor, by making absolute conveyance to the beneficiary, has trusted wholly to his good faith and sense of duty. See *Emigrant Co. v. Adams County* 100 U. S. 61, 69.

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The bill, however, does not proceed on the theory of a trust. Its theory is that the donor in making a gift for a specific purpose has required the donee to give security against misappropriation, and the complainants, as the donee's sureties, are entitled to the protection of equity. There is an implied agreement between them and the defendant that the moneys shall be faithfully applied according to the intent of the gift, and a misappropriation would be a species of fraud. Nor is it any answer to say that the State, having conveyed absolutely, cannot possibly be damnified and therefore cannot in any event recover on its bond. The State, as donor, in releasing the condition of forfeiture contained in the act of 1861, had an interest amply sufficient to support the bond, and the bond was intended to accomplish the same purpose which the provision of forfeiture had in view. This was, to restore the property, or an equivalent, to the State in case of attempted misappropriation.

The vital question in the case, however, is whether any misappropriation, actual or threatened, is shown. The question must be solved on a consideration of the purpose of the grant, and the use which has been or is proposed to be made of the proceeds. The general purpose of the grant is made very plain by the statute. It was to aid a private educational institution to accomplish the object for which it was established. That object was to give instruction to those who should apply for it. To do this it must have buildings, means of illustration and teachers, and to obtain these it must have money. The State deemed it wise to provide that the moneys to be realized from its donations should be applied, not in the payment of teachers' wages, or for current expenses, but to the procuring of necessary buildings. If under any and every conceivable circumstances the application must be made according to the very terms of the grant, the agreed facts show that the corporation is already in default for some of them have been used otherwise.

The general rule undoubtedly is, that public grants are to be construed strictly as against the grantees. *United States v. Arredondo* 6 Pet. 691; *Charles River Bridge v. Warren*

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Bridge 11 Pet. 544; *Martin v. Waddell* 16 Pet. 367; *Dubuque etc. R. R. Co. v. Litchfield* 23 How. 66; *Baltimore v. Railroad Co.* 21 Md. 50; *Bradley v. Railroad Co.* 21 Conn. 294; *Richmond v. Railroad Co.* 21 Grat. 614; *DeLancey v. Ins. Co.* 52 N. H. 581; *La Plaisance Bay Harbor Co. v. Monroe* Walk. Ch. 155; *Pennsylvania R. R. Co. v. Canal Com'rs* 21 Penn. St. 22. The grantee shall take nothing which is not plainly granted, and as is said in the case last cited, "every resolution which springs from doubt is against" him. But there is no question in this case in respect to the grant; its terms are clear and precise and its extent undisputed; the controversy arises upon the terms of a restraint imposed by the grant, and which is in the nature of a condition subsequent, and tends to a defeat of the grant by way of forfeiture. If the grant is to be construed strictly as against the grantees, the condition is to be construed strictly against the State; and the State is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made. The purpose of construction is to give effect to an instrument; not to defeat it: *Rice v. Railroad Co.* 1 Black 358; *People v. Burns* 5 Mich. 114; *Tabor v. Cook* 15 Mich. 322; and in a public grant especially, more than in any other, we should expect to find provisions looking to the permanent enjoyment of the right or property granted as against mere technical breaches of contract or condition on the part of the grantee, not tending to defeat the general purpose.

The general intent of the grant, as has been said, was to aid the incorporation in accomplishing its objects, but the funds realized must be expended in buildings. Buildings would be permanent and could not be wasted, and by requiring their construction, the State would guard as far as was practicable against its bounty being lost. But suppose the corporators when the lands were received had deemed it wise to withhold them from market for a term of years in anticipation of a rise in value consequent upon the improvement of the State, and by the donations of themselves and their friends, had procured all necessary buildings; would they

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thereby have lost the benefit of the grant and entitled the State to demand a reconveyance? This, as we think, is in substance the question now before us.

A liberal and technical construction of the grant would require the very moneys realized from the lands to be applied to the purchase or erection of buildings. But the view consonant with the generosity which prompted the donation looks beyond the technicality, and finds the purpose substantially accomplished if the grant has enabled the donee to procure buildings for its purposes, whether exactly in the method contemplated or otherwise. If buildings were procured of a value equal to the fund donated, the condition of the grant would be kept in spirit, and it would be beneath the dignity of the State to raise technical objections and demand a forfeiture based upon a failure in literal compliance under such circumstances. Sovereignties do not deal with the objects of their bounty in that spirit.

In this case the grantee did not purchase or erect buildings, but it accomplished what was equivalent: it was enabled by consolidation with another organization formed for the same purpose to procure the buildings it needed. The value of these was equal to the grant, and it is conceded that they supply the corporate needs. The end, therefore, that was to be accomplished by the State grant, is now accomplished. Confessedly the defendant might still invest the State bounty in further buildings, but it has no need for them, and the fund would be wasted if made use of in that way. The State intended the fund should benefit the defendant, and we find nothing in the act which justifies us in saying that the State contemplated that under any circumstances the alternative would be presented to the defendant of either wasting the grant or restoring it. The restraint imposed by the grant was meant to prevent waste; not to invite or encourage it.

It may be said that if the money is not needed for buildings now, it is the duty of the defendant to keep it for that purpose until the time when it shall be needed. But if the statute had contemplated the erection of buildings at some

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indefinite time in the future after those first erected or obtained had gone to decay or been destroyed, it would have contained quite different provisions. It is entirely safe to say the State would not have accepted personal obligations as security for the application of the moneys at a distant and indefinite time when all the sureties would be likely to have passed away.

The conclusion is that the fears of the complainants are groundless, and their bill should be dismissed. We are inclined to think, however, there should be no costs awarded.

The other Justices concurred.

MEMORANDA.

THE DETROIT & BAY CITY RAILROAD COMPANY v. JAMES GRAHAM, HIGHWAY COMMISSIONER OF THE TOWNSHIP OF VASSAR.

Condemnation for highway—Award of damages—Certiorari.

An appeal to the township board from the decision of a highway commissioner in awarding damages for property taken for a highway is provided for by Comp. L. § 1264 (Act 216 of 1875); and if the only question is as to the amount of damages, *certiorari* will not lie to the commissioner to remove the proceedings to the Supreme Court, where no reason is given for not resorting to the remedy by appeal

Certiorari. Submitted June 23. Writ quashed June 23.

G. V. N. Lothrop for plaintiff in certiorari.

Black & Quinn for defendant in certiorari.

PER CURIAM. In this case the only question involved is as to the proper amount of damages which should be awarded for the taking of the property of the Railroad for highway purposes. The statute has provided for an appeal from the Highway Commissioner to the Township Board.

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It must be presumed that if the commissioner refused to consider the proper elements of damage, the board would have done justice on the appeal. We think the case should have been appealed, and as no sufficient reason appears why that remedy was not resorted to, we see no ground for permitting the *certiorari* to stand, and it must be dismissed as improvidently granted.

GEORGE W. GUILEY v. SUSANNAH GUILEY.

Appeal from Saginaw. Submitted June 30. Decided July 1.

BILL for divorce. Complainant appeals. Reversed and decree granted.

John E. Nolan for complainant.

Albert Trask for defendant.

GRAVES, J. Without going into any discussion of the facts it is sufficient to observe that the case made by the proof entitled the complainant in our opinion to a decree.

The decree below will therefore be reversed and one entered granting the divorce prayed for.

The other Justices concurred.

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CORRECTIONS.

VOL. 45.

Page 62, note 2, line 2: Read "defendant" for "plaintiff."

Page 143, note 1: Omit the words "or joint owner."

Page 355, note: Read "*a* week day."

Page 424, note, line 1: Read Court for Bourt.

Page 477, head line: Read HOWELL v. KITTRIDGE.

Page 489, line 4: Read "attached" for "attacted."

Page 659, Index. The entire title "CRIMINAL LAW" was omitted by the printer in making up the pages of the Index. The notes given under it belonged to *Patrick Ryan's Case*, p. 173; *Preston v. People*, p. 486, and *Beecher v. Anderson*, p. 543.

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of amount due on justice's judgment: EXECUTION, 6, 7,—**338.**
of publication: MORTGAGE OF LAND, 19,—**418.**
witness cannot be asked what he stated in: WITNESS, 5,—**161.**
AGENCY
1 Where an agent, intrusted with the collection of debts and foreclosure of mortgages, seeks to deceive his principal by representing that payments have not been made on a mortgage, the latter can maintain *assumpsit* on the common money counts against him for moneys received in making collections thereon and for moneys advanced to be used in foreclosing it. And it is proper to examine plaintiff as to every conversation had with defendant in regard to the transaction in controversy, especially where it is claimed that he tried to prevent plaintiff from having an interview with the mortgage debtor. *Schmemann v. Rothfuss*, 453.
agent in taking MORTGAGE OF LAND, 3, 4,—**393, 394.**
agent may procure INSURANCE, 1,—**16.**
tax purchase by agent, no resulting trust: TAXATION, 17,—**253.**
ALDERMAN
Common Council, final judge of election of: MUNICIPAL CORPORATIONS, 1,—**138.**
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"right of way of," in deed: EASEMENT, 5,—**303.**
obstruction of outlet to, enjoined: EASEMENT, 6,—**303.**
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ex parte, of decree for SPECIFIC PERFORMANCE, 6,—**518.**
of guardian's inventory: GUARDIAN, ETC., 6,—**93.**
where guardian in his own name brought EJECTMENT, 6,—**87.**
ANIMALS: *Title to young of*, 1; *taxing dogs*, 2, 3; *taken damage feasant*, 4-6.
1. Where one buys a mare on credit and gives a chattel mortgage on her for the entire purchase price, and she is afterwards found to be with foal which is not weaned before the credit expires, he is not entitled to keep the colt, if he makes default in payment and the mare is taken on the mortgage. *Kellogg v. Lovely*, 131.
2. Act 198 of 1877 taxing dogs and appropriating the resulting fund to the payment of damage done by dogs to sheep, is not strictly a tax law within the contemplation of article XIV of the Constitution, but is an exercise of the police power of the State. *Van Horn v. People*, 183.

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3. Dogs are properly subjected to special and peculiar regulations for the purpose of repressing the mischief likely to be done by them to more valuable property and to persons. *Id.*
4. Trover will not lie for an animal taken *damage feasant* and detained by the injured party—there being no pound in the township—if the owner is notified, or otherwise ascertains the animal's whereabouts, and the cause of its detention within twenty-four hours, and refuses to pay reasonable damages. Comp. L. ch. 214. *Norton v. Rockey*, 460.
5. Notice to the owner of an animal that it has been taken *damage feasant* and impounded, is waived by the owner if he discovers the facts within the time allowed for giving notice, and refuses to pay lawful damages. *Id.*
6. Replevin will lie for an animal detained by one who has taken it *damage feasant* if the amount of damages demanded is excessive; or the owner is allowed to have the damages assessed by disinterested persons. Comp. L. §§ 6777, 6784. *Id.*

evidence as to value of injured cattle: ACTION, 4,—**241.**

ANSWER

to application for execution for deficiency: MORTGAGE OF LAND, 29, —**490.**

APPEAL: *From a justice*, 1, 2: *from probate proceedings*, 3, 4; *in equity*, 5–9.

1. On special appeal from a justice errors will not be reviewed that do not involve some decision, express or implied, in the exercise of jurisdiction. Comp. L. § 5432. *Maxwell v. Deens*, 35.
2. A justice's return to a special appeal is assumed to contain all that took place before him; if defective, a farther return should be required, and if a party goes to hearing upon it without objection, he is presumed to have none. *Id.*
3. The conclusions of the circuit court upon an appeal from probate proceedings for the settlement of a guardian's account, should take the shape of an order showing what is allowed and what is not, and providing that it be certified to the courts below. *Bondie v. Bourassa*, 321.
4. Dismissal of an appeal from the probate of a will is a final judgment which remands the proceedings to the probate court, and which cannot be set aside if not complained of within the two years allowed for removing proceedings to the Supreme Court on error or *certiorari*. *Ellair v. Wayne Circuit Judge*, 496.
5. The original minutes of oral testimony taken in open court in a chancery case, must not be removed from the files to be used as copy in printing the record, unless by an order of the Supreme Court. But in a case where they were so removed and were destroyed by the printer, the appellants, who were not shown to have had any knowledge that they had been so used, were allowed, for the purpose of saving their rights, to file a copy of the evidence in lieu of the original. *Lamb v. Hinman*, 112.
6. Transcripts from partnership books, and not the books themselves, should be returned to the Supreme Court on an appeal from a decree on an accounting, unless there is something in the appearance of the books which is necessary to consider on questions of fraud or forgery, or some special difficulty. Otherwise parties ought not to be deprived of the custody of their books. *Harrison v. Dewey*, 173.
7. Appeals bring up some action of the lower court which is complained of as erroneous. A consent order, therefore, cannot be appealed from, even where it is itself a stipulation for removing the case without costs in order to settle a question of jurisdiction. *Chapin v. Perrin*, 130.

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8. Where no appeal is taken from a decree which determines all matters except an equity reserved for farther consideration and the only appeal is from a subsequent decretal order determining the reserved equity, the matters determined by the first decree are not open to review on the appeal from the decretal order. *Hack v. Norris*, 587.
9. A decree may be affirmed where the appellate court is not satisfied that the trial judge was in error in his findings as to the preponderance of testimony. *Matteson v. Blackmer*, 393.
affirmance in doubtful cases, costs: DIVORCE, 5, 6,—**66**; COSTS, 9,—**68.**
costs on, see COSTS, 8-13.
cross appeals, costs on: COSTS, 7, 8,—**405.**
discretion of circuit judge in awarding costs: COSTS, 3,—**306.**
to town board, precludes *certiorari* to commissioners of HIGHWAYS, 1,—**642.**
necessity of proof of documents: PRACTICE, 7,—**120.**
objection to be raised below: BILLS AND NOTES, 3,—**1.**
record defective as to documents: PRACTICE, 8,—**121.**
special, what objections cannot be raised on: TRESPASS, 1,—**36.**
what defect not open on: EQUITY, 7,—**244.**
bond covers what costs: COSTS, 5, 7,—**405.**
bond, fraudulent execution: SURETYSHIP, 4,—**424.**
bond, judgment against sureties on: SURETYSHIP, 3,—**321.**
APPOINTMENT
of commissioners, notice of: DRAINS, 1,—**138.**
APPRAISAL.
jurisdiction to appoint commissioners: RAILROAD COMPANIES, 1—**190.**
APPURTENANCE
easement lost by lapse of: EASEMENT, 3,—**575.**
ARREST
cross-examination as to fact of: WITNESS, 6,—**336.**
of trespasser on land, affidavit for: TRESPASS, 1-3,—**36.**
ASSAULT AND BATTERY
for not leaving railway station: RAILROAD COMPANIES, 3, 4,—**439, 440.**
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bill to enjoin complainant's: TAXATION, 19,—**236.**
for grading streets: see STREETS, 1-8,—**150.**
for paving, legality of: STREETS, 10—**120.**
of damages, for animals taken *damage feasant*: ANIMALS, 6,—**461.**
of damages, not made in Supreme Court: PRACTICE, 19,—**83.**
for public improvements: see STREETS.
of taxes: TAXATION, 2-4,—**526.**
ASSIGNMENT.
assignee can sue on chattel note: TROVER, 1,—**488.**
by mortgager, of claim for rent: MORTGAGE OF LAND, 12,—**539.**
death-bed assignments: GIFT, 1, 4, 5,—**166, 167.**
for benefit of creditors: DEBTOR, ETC., 1,—**78.**
assignee's failure to file bond: DEBTOR, ETC., 1,—**78.**
superseded by decree in BANKRUPTCY, 1—**422.**
issue as to, by subsequent incumbrancer: MORTGAGE OF LAND, 10,—**521.**
lease on shares, when not assignable: LANDLORD, ETC., 5,—**311.**
forfeits a personal lease: LANDLORD, ETC., 6,—**311.**
of error, frivolous, costs as damages for delay: PRACTICE, 9,—**453.**
of grantee's right of action on: COVENANT, 1,—**325.**
of mortgage, priority of record: MORTGAGE OF LAND, 9,—**521.**
without consideration: INSURANCE, 5,—**463.**

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ASSOCIATION: see MUTUAL BENEFIT ASSOCIATION.
ASSUMPSIT.
1. A mortgagee of chattels cannot recover in assumpsit for their value if they are converted. *Carpenter v. Graham*, 531.
2. One who has left money for safe keeping with another who has put it into a bank, can maintain *assumpsit*, declaring on the common counts, against one who has drawn it and appropriated it on pretence of being the guardian of the person with whom it was left. *Martin v. Sheridan*, 93.
3. Suit on *quantum meruit* lies where the mode of performing an unapportionable contract is so changed that the contract price for what has been done cannot be determined. So *held* where a person was employed to cut and skid logs and put them into Muskegon river at three dollars a thousand, and after cutting and skidding a quantity his employer directed him to cut no more and to put such as had been cut into Cedar Creek, and there was nothing to show what relation the cutting and skidding bore to the whole work. *Boyce v. Martin*, 239.

against collecting agent: AGENCY, 1,—**453.**
for money paid on oral promise to devise: WILL, 1,—**62.**
for tenant's share of crop: LANDLORD, ETC., 35,—**219.**
right to prove value of services: MASTER, ETC., 11,—**416.**
will not lie for money loaned for produce gambling: ACTION, 2,—**447.**

ATTACHMENT.
1. Rights acquired by attachment are inchoate until judgment and levy of execution. *Fuller v. Hasbrouck*, 78.
2. An attachment upon machinery bolted to the freehold is binding if the sheriff obtains full control of it, and he need not detach and remove it either to perfect his levy or to deliver possession on receipt of a forthcoming bond. *Patch v. Wessels*, 249.
3. When a sheriff on receipt of a forthcoming bond has surrendered possession of attached property, he is not bound to secure the attachment debtor from interference with his possession by third parties. *Id.*
4. Whether the sureties on a forthcoming bond in attachment, having recognized the possession of the sheriff, can dispute the recitals to that effect in the bond—*Q.* *Id.*

ATTORNEY AND CLIENT.
1. Retainer of a solicitor is not presumed to cover proceedings taken subsequent to the decree and for its enforcement. *Ransom v. Sutherland*, 489.

newspaper libel upon lawyer: LIBEL, 1, 2,—**341.**

AUDITOR GENERAL.
bill against, to clear title from tax sale to estate: TAXATION, 18,—**256.**

BAILMENT
bailee of note, when liable for conversion: TROVER, 2,—**488.**
ownership of the young of ANIMALS, 1,—**131.**

BANKRUPTCY.
1. A trustee in bankruptcy can maintain replevin for property of the bankrupt sold on an execution against him after the decree of bankruptcy, *Coats v. Farrington*, 422.
2. A trustee in bankruptcy can maintain replevin for property belonging to the bankrupt but held by one who claims under a contract purchaser who has not fulfilled the terms of the contract. *Gordon v. Farrington*, 420.
3. Oral evidence is admissible, if no objection is made, to show that plaintiff in replevin is trustee in bankruptcy of the owner of the

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property, and that his previous right as assignee of the owner is not cut off by the decree in bankruptcy so far as relates to the right to maintain the action. *Id.*

BASTARDY.

1. A complaint for bastardy made March 20, 1880, and alleging existing pregnancy, is not invalidated by complainant's uncertainty whether it was caused September 15, October 1 or October 15, 1879, it appearing also that the child was born June 26, 1880. *Hamilton v. People*, 186.
2. A complaint for bastardy may properly be read at the trial, especially where complainant and defendant are thoroughly examined and cross-examined, and the complainant's examination covered everything which the complaint set forth. *Id.*
3. A jury cannot pass on objections to the sufficiency of a complaint for bastardy nor decide whether evidence has been improperly received under it. *Id.*
4. Objections to specific charges in a complaint for bastardy as irrelevant and unsustained by proof, should be specially made, and not raised by a general objection that the court should have charged the jury that the complaint must set forth the time and place of the offense and the allegation must accord with the law of nature and that proofs must be confined to the complaint. *Id.*

BAY CITY

approval of liquor bond by council: LIQUOR LAW, 2,—**98.**

BENEFICIARY FUND.

bequest of: MUTUAL BENEFIT ASSOCIATION, 1,—**429.**
not assets of estate: MUTUAL BENEFIT ASSOCIATION, 2,—**429.**
costs on alteration of decree disposing of: Costs, 12,—**429.**

BEQUEST

of beneficiary fund: MUTUAL BENEFIT ASSOCIATION, 1,—**429.**

BIDDERS

for paving contracts, notice to: STREETS, 11,—**120.**

BILL FOR SPECIFIC PERFORMANCE: see SPECIFIC PERFORMANCE.

BILL IN AID OF EXECUTION: see EQUITY, 7-12.

BILL IN EQUITY.

joint, when will not lie: EQUITY, 17, 18; TAXATION, 5, 19,—**236.**
to set aside conveyances by intestate: ESTATES, ETC., 4,—**33.**

BILL TO CLEAR TITLE

from tax sale to the State: TAXATION, 18,—**256.**
possession necessary: EQUITY, 15,—**51.**

BILL TO ENJOIN COLLECTION OF TAX.

of street tax: STREETS, 5,—**150.**
no presumption against correctness of official action: TAXATION, 8,—**150.**

BILL TO QUIET TITLE

against indefinite claim: EQUITY, 16,—**324.**
of wife, against husband's creditors: HUSBAND, ETC., 2,—**324.**

BILL TO SET ASIDE DEED: see EQUITY, 7-14.

for grantor's incompetency, burden of proof: DEED, 3,—**146.**

BILLS AND NOTES.

1. A creditor's failure to present promptly a draft drawn in his favor, and accepted for accommodation only, does not release the debtor where the drawee was never supplied with funds to meet it, and the maker suffered no loss by the neglect; especially if after protest the maker recognized his continued liability for the debt. *Compton v. Blair*, 1.
2. Casual statements made by the holder of a draft, or on his behalf, to the effect that it has been paid, do not estop the creditor from

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enforcing its payment, if the debtor is not actually misled by them. *Id.*

3. A judgment debtor sought to enjoin the collection of the judgment to the amount of a draft which he had given as collateral security, but which the creditor had failed to collect. It had been accepted merely for accommodation and without funds to pay it, and the drawee had afterward failed. The suit for injunction was brought more than seven years after it had gone to protest, and it was decreed that complainant pay the amount found due on the judgment. *Held*, that the objection that defendant should have been required to surrender the draft, or, if it were lost, give an indemnifying bond, had no force, especially if raised for the first time in the appellate court. *Id.*

bailee, when liable for note's conversion: TROVER, 2,—**488.**
conversion of chattel note: TROVER, 1,—**488.**
estoppel to repudiate paper, against CORPORATION, 4,—**482.**
joint note, contribution from surety: SURETYSHIP, 5,—**328.**
proof of indorsement, handwriting: EVIDENCE, 2,—**482.**

BISHOP
not liable for priest's salary: RELIGIOUS SOCIETIES, 1,—**457.**

BOARD OF EQUALIZATION
action of majority, when legal: STREETS, 8,—**151.**

BOARD OF HEALTH
of township, location of CEMETERY, 1-4,—**542.**

BOARD OF PUBLIC WORKS
action as to paving STREETS, 10,—**120.**
estimate of cost of public improvement: STREETS, 5,—**150.**

BOARD OF SUPERVISORS
effect of action legalizing BRIDGES, 1, 2,—**278.**
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action of majority, when valid: STREETS, 8,—**151.**
disqualification of members, by personal interest: SCHOOLS, ETC., 3,—**127.**
presumptions of proper intent: CEMETERY, 2,—**542.**

BOND.
1. In an action on a bond evidence tending to show that its execution is fraudulent is for the jury, especially if the fact is not conceded or beyond dispute. *Woodin v. Durfee*, 424.

appeal, covers what COSTS, 5, 7,—**405.**
appeal, fraudulent execution: SURETYSHIP, 4,—**424.**
appeal, judgment against sureties on; SURETYSHIP, 3,—**321.**
for return of goods: ATTACHMENT, 3, 4,—**249.**
in replevin, secures costs on *certiorari*: COSTS, 4,—**12.**
municipal power to issue refunding bonds: MUNICIPAL CORPORATIONS, 6-8,—**565.**
of indemnity, for lost draft: BILLS AND NOTES, 3,—**1.**
of liquor dealer: LIQUOR LAW, 1, 2,—**98.**
omission of assignee for creditors to file: DEBTOR, ETC., 1,—**78.**
taxation for, of railway company: TAXATION, 12,—**193.**
to State, to secure performance of conditions in: GRANT, 2,—**626.**

BOOKS.
transcripts to be returned on APPEAL, 6,—**173.**
parties to have custody of: APPEAL, 6,—**173.**

BOUNDARY.
jurisdiction of crimes near: CRIMINAL LAW, 1,—**222.**

BRIDGES.
1. Where the Legislature legalizes rates of toll fixed by a board of supervisors for the use of a bridge previously erected without

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authority of law, the action of the two bodies precludes any question of the legality of the bridge thereafter. *Maxwell v. Bay City Bridge Co.* 278.
2. An existing claim for damages arising from the establishment of an unauthorized bridge is not cut off by the action of the Legislature and the supervisors in merely recognizing the bridge as lawful, though no such claim can arise after their action. *Id.*
3. Whether the State can so legalize a bridge as to cut off pre-existing claims for injuries resulting from its maintenance—Q. *Id.*
4. A dock owner whose property is injured by the proximity of a bridge, is not estopped from claiming damages by the mere fact that his grantor had petitioned for the bridge, if the bridge company's action was not determined by the acts of the grantor. *Id.*
5. In an action for damages to a dock-owner resulting from the construction of a bridge near by which tended to prevent vessels from stopping at the dock, it is admissible for the plaintiff, after showing such interference, to give a general estimate of the annual damage caused him thereby; the defence can cross-examine him as to the particulars upon which the estimate was formed, and the weight of the evidence is for the jury, who should take it in connection with other facts in evidence. *Id.*
6. In an action for actual damages the defendant's good faith has no bearing. *Id.*
7. In an action for damages to property caused by neighboring structures, the fact that plaintiff has offered to lease part of the property to defendant has no proper bearing in the case. *Id.*

BRIEFS.
costs of printing: COSTS, 13,—**490.**

BROKER.
waiver of lien on wheat: ESTOPPEL, 1,—**5.**

BUILDINGS.
government grant for construction of: GRANTS, 2-4,—**636.**
presumed to go with the land: REAL PROPERTY, 1,—**389.**

BURDEN OF PROOF
in explaining surety's omission to join in execution: SURETYSHIP, 4,—**424.**
of fair dealing: GIFT, 1, 2,—**166, 167.**
of grantor's incompetency: DEED, 3,—**146.**
of liability, is on plaintiff: PRACTICE, 10,—**309.**
on party relying on new contract: CONTRACT, 6,—**239.**
to show matter in discharge of personal decree: MORTGAGE OF LAND, 31,—**490.**

BURYING GROUND: see CEMETERY.

CARRIERS.
1. A common carrier's liability does not attach to a log-driving company for failure to deliver part of a quantity of logs received by it to be driven to their destination. *Mann v. White River Log & Booming Co.*, 38.
2. The rule by which one who rides in a private conveyance is presumed to control or be identified with the driver and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance. *Ouddy v. Horn*, 596.
3. Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence. *Id.*

accident to passenger in street car: NEGLIGENCE, 3, 10,—**498.**
obligation to forward cars: RAILROAD COMPANIES, 6, 7,—**258, 259.**

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CASE MADE
no review without special findings: PRACTICE, 20,—**551.**
CAVEAT EMPTOR
title to personalty: SALE, 4,—**485.**

CEMETERY.

1. The court of chancery has an undoubted jurisdiction to enjoin the action of township boards of health in establishing burial places, should they proceed to exercise it illegally or improperly to the injury of others. *Upjohn v. Richland Bd. of Health*, 542.
2. But these boards have large discretionary powers, the exercise of which will not be interfered with until a clear case is made out. It must be intended, until the contrary is shown, that they are acting in good faith and in the line of their duty. *Id.*
3. Complainant sought to enjoin the location of a burying ground near his residence, for the reason, among others, that it would destroy his well. *Held*, to be a strong circumstance against his application that he had voluntarily bought and located his residence in the immediate vicinity of a burying ground which defendants were merely proposing to enlarge without bringing it nearer. *Id.*
4. And it appearing further that complainant's barn yard was nearer the well and more likely to injure it than the burying ground, *held*, that an injunction should be denied. *Id.*

CERTIFICATE
as to time of redemption on foreclosure: MORTGAGE OF LAND, 24,—**107.**
of registry of MORTGAGE OF LAND, 8,—**521.**
to deposition: DEPOSITION, 2,—**95.**

CERTIORARI: *Issue of*, 1; *when will lie*, 2; *laches in suing out*, 3–5; *return*, 6, 7; *what reviewed on*, 8–10.

1. *Certiorari* is not a writ of right, and can only issue on satisfying the circuit court commissioner or circuit judge that an error has been committed. Comp. L. § 5466. *Young v. Kelsey*, 414.
2. *Certiorari* will lie to review proceedings to condemn land when void for want of jurisdiction; though it should not be favored where any other remedy is adequate. *Dunlap v. Toledo, Ann Arbor & Grand Trunk Ry. Co.*, 190.
3. A writ of *certiorari* in cases involving interference with important works ought not to be allowed unless applied for as soon as practicable; and if granted after the expiration of the twenty days allowed for an appeal in proceedings to condemn land, will not be sustained unless the delay in suing it out is satisfactorily explained. *Id.*
4. A writ of *certiorari* to review proceedings for laying out a ditch was sued out eight months after the work had been finished and when the only assessments in arrears were those for which the petitioner was liable. The work had continued more than a year and was to be paid for in three annual assessments. *Held*, that the fact that he was out of the county when he heard the ditches were finished was not in itself a sufficient excuse for his delay in suing out the writ, and that it was not the proper remedy to enforce whatever rights he might have. *Bresler v. Ellis*, 335.
5. *Certiorari* to review proceedings to carry out public improvements should not be granted after any considerable delay in suing out the writ, unless the court is satisfied that the delay is not due to the petitioner's neglect. *Id.*
6. The return to a writ of *certiorari* must be assumed to be correct. *Young v. Kelsey*, 414.
7. Where the return to a writ of *certiorari* shows that it was never allowed, a judgment dismissing it will be affirmed without consid-

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ering whether the plaintiff therein would have been entitled to amend it, or whether he could bring error on the refusal to allow an amendment of it. *Id.*
8. On *certiorari* all objections that are not to the merits must be disregarded. Comp. L. § 5477. *Hart v. Port Huron*, 428.
9. On error bringing up a judgment affirmed on *certiorari*, the Supreme Court will decide as the right of the matter may appear. *Wattles v. Moss*, 52.
10. Judgment in such a case should not be reversed for error in receiving a deposition where there is proof of the fact deposed to aside from the deposition. *Id.*
costs on, secured by bond in replevin: COSTS, 4,—**12.**
to highway commissioner, precluded by APPEAL: HIGHWAYS, 1,—**642.**
CESTUIS QUE TRUSTENT
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COMPETENCY
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CONTRACT: *Existence and acceptance*, 1–4; *signature*, 5; *changing*, 6; *defense of public policy*, 7; *reference to other papers*, 8.
1. The existence of a contract is a question independent of circumstances that may excuse its performance. *Eggleston v. Wagner*, 610.
2. There is no acceptance where a proposal to grant one thing is answered by an offer to close the matter and take another; or, when the proposal involves executory proceedings on each side, and the person to whom it is made couples with his acceptance conditions that essentially change the offer or materially vary its effect. *Id.*
3. An offer and acceptance cannot of themselves constitute a contract unless the acceptance is absolute and unconditional, complies with the conditions of the proposal, and includes whatever undertaking, right or interest the proposal calls for; nor unless they correspond in regard to subject matter and the extent of the interest to be transferred. *Id.*
4. One partner offered to sell out to another for a specified sum but afterwards bought out the other instead, though he gave him, at the same time, an extension of the offer to a fixed date. Meanwhile the business was carried on, old debts were paid and new ones contracted, and substantial changes occurred. *Held* that a tender, at the end of the time limited, of the amount stated in the

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offer, in payment for the interest then held by the partner who had made it, was not such an acceptance of the offer as would create a contract relation, as it amounted to a proposal to take more than was offered. *Id.*

5. Where a party verbally directs his name to be attached to a contract, and it is done under his personal supervision, he is bound as if by his own signature. *Id.*
6. It is for the jury to determine whether a change in a contract was agreed upon by the parties, under instructions that the burden is on the party relying upon a new contract to prove it. *Boyce v. Martin*, 239.
7. A party to a contract deliberately made without fraud or deceit is in no position to defend against it on grounds of public policy, but the defence is allowed in the public interest. *Mutual Benefit Association v. Hoyt*, 473.
8. Where a contract refers to a plan, specifications and profile, and makes them a part of itself, and they are not given in the record, it cannot be presumed, in a suit in equity, that they do not supply apparent omissions from the contract. *Cuming v. Grand Rapids*, 150.

action on joint contract: PLEADING, 8,—**141.**
contract relation not established by acceptance of public office: OFFICER, 4,—**478.**
fixing salary, when not a contract: OFFICER, 3,—**22.**
for paving: STREETS, 10,—**120.**
for sale of lands, sufficiency of description: STATUTE OF FRAUDS, 2, 3,—**610.**
implied promise to pay INTEREST, 2,—**193.**
notices to bidders for paving: STREETS, 11,—**120.**
of purchase, when binding: SALE, 1,—**308.**
of suretyship, alteration of: SURETYSHIP, 1,—**117.**
right of party in default, to SPECIFIC PERFORMANCE, 3, 4,—**290.**
when interest not allowed on advances: INTEREST, 4,—**239.**
when *quantum meruit* lies: ASSUMPSIT, 3,—**239.**

CONTRACTOR
paving, as party to suit: STREETS, 9,—**120.**

CONTRIBUTION
from surety: SURETYSHIP, 5,—**328.**

CONTRIBUTORY NEGLIGENCE; See NEGLIGENCE, 9, 10.

CONVERSATION.
examination as to: AGENCY, 1.—**453.**

CONVERSION.
bailee of note is liable for: TROVER, 2,—**488.**
of chattel note, trover lies: TROVER, 1,—**488.**
of logs, damages for: DAMAGES, 3,—**485.**
of mortgaged chattels, mortgagee cannot bring ASSUMPSIT, 1,—**531.**

COPY
of minutes of oral testimony, use on APPEAL, 5,—**112.**

CORPORATIONS.

1. The State has the same power to authorize several existing corporations to associate themselves together and organize themselves into a new corporation, as it has to incorporate individuals. *State Treasurer v. Auditor General*, 224.
2. A corporation is a creature of the sovereign will, and when created by one sovereignty it can operate within another's limits only by the latter's express permission, or by permission implied from principles of comity, but such permission does not make it any the less a foreign corporation. *Id.*
3. Power to appoint a temporary secretary is incidental to corporate

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meetings; and if he has been entrusted with all the functions of the office his record and doings are valid, and they cannot be invalidated by any presumption that he was not sworn, especially if there was nothing requiring it to appear that he was sworn. *First National Bank of St. Joseph v. St. Joseph*, 526.

4. A company supposing itself to be incorporated issued paper in its corporate name, but afterwards finding that it was not properly organized, dissolved and was legally incorporated under a different name. *Held*, that it could not repudiate its paper. *Empire Mfg. Co. v. Stuart*, 482.
5. The dissolution of a company not regularly incorporated, but supposing itself to be so, does not prevent creditors from looking to the old organization for payment. *Id.*

educational, gift to, from State: GRANT, 2,—**636.**
consolidation of RAILROAD COMPANIES, 2,—**193.**
taxing stock, etc., of: TAXATION, 11, 13,—**193.**

COSTS: *Excessive judgment for*, 1, 2; *on appeal from justice*, 8; *what covered by replevin bond*, 4; *by appeal bond*, 5–7; *on appeal in equity*, 8–13; *on mandamus*, 14.

1. Costs when made up are an incident of the judgment, but are not so inseparable from the damages as to invalidate a justice's judgment therefor, when excessive. Comp. L. § 5479. *Whelpley v. Nash*, 25.
2. Where excessive costs have been awarded by a justice in giving judgment, and the judgment debtor does not appeal, the party recovering judgment is entitled to rectify the error by remitting the costs and suing again upon the judgment for damages. *Id.*
3. The discretion of a circuit judge in awarding costs in appeal cases is not reviewable by the Supreme Court. *Smith v. Hubbard*, 306.
4. A replevin bond covers the costs of all courts even though the case be removed on *certiorari* from before a justice, if a final judgment on writ of error awards all costs below. *Monroe v. Heintzman*, 12.
5. Appeal bonds are not limited to securing such costs only as result from the appeal; they cover also costs made before the decree. *Prosser v. Whitney*, 405.
6. A prevailing party in a chancery cause cannot object, in the appellate court, to the denial of costs below if he has let the case go up on his adversary's appeal alone without appealing himself from so much of the decree as he objected to. *Id.*
7. Where the parties to a chancery cause make cross-appeals upon which one succeeds and recovers costs as against the other, the latter's appeal bond may be made to secure their recovery even though his own appeal was merely from a denial of costs below, and the appellate court passed upon his adversary's appeal alone, without reference to his, and awards costs of both courts against him. *Id.*
8. Where both cross-appellants fail, costs may be apportioned between them in the discretion of the court and on a consideration of the equities. *Id.*
9. Each party may be left to pay his own costs where a decree of dismissal is affirmed in a doubtful case. *Price v. Price*, 68.
10. Costs may be allowed complainant on appeal, even though the decree is modified in favor of the appellant, if the latter's defence shows no willingness to do justice. *Wohlscheid v. Bergrath*, 46.
11. Costs of the Supreme Court were not allowed either party as against the other, where both appealed and where the decree was only modified as to the losing party. *Rhead v. Hounson*, 243.
12. Costs were not granted as against the minor heirs where a decree disposing of a beneficiary fund was altered in favor of the widow who appealed. *Catholic Benefit Association v. Priest*, 429.

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13. Where both parties in a chancery proceeding mistook the practice, and there were no special equities in defendant's favor, he was allowed, on reversal, to recover the costs of printing the record and his brief in the Supreme Court, but in other respects each party was left to pay his own costs. *Runnom v. Sutherland*, 489.
14. Costs may be granted against a circuit judge on allowing a writ of mandamus to compel him to vacate an illegal order. *Ellair v. Wayne Circuit Judge*, 496.

as damages for delay: PRACTICE, 9,—**453.**
interest on judgment for: INTEREST, 1,—**25.**
on affirmance in doubtful cases: DIVORCE, 6,—**66.**
of public improvement: STREETS, 7,—**151.**

COURTS.
1. It is not so much the value of the property in litigation as the damages involved which affects the jurisdiction. *Eldred v. Woolaver*, 241.
2. Where removal papers have been filed to transfer a case from a State to a federal court, an order from the State court is unnecessary to complete the transfer, and, if entered, is nugatory. *Le Roux v. Bay Circuit Judge*, 189.
3. A party who desires that a cause removed to a federal court should proceed in the State court, should move the federal court to remand it, and if his motion is denied he has a remedy by act of Congress whereby his rights can be determined by the Supreme Court of the United States. *Id.*

judicial notice of incidents of railway travel: NEGLIGENCE, 11,—**498.**
judicial notice of mode of railway management: RAILROAD COMPANIES, 7,—**259.**
jurisdiction by value in REPLEVIN, 2,—**241.**
venue of transitory actions against non-residents: ACTION, 5-7, —**552**, **553.**

COVENANT.
1. The grantee in a deed containing the "usual covenant of warranty" cannot sever his right of action thereon, and assign it to another person while he keeps the premises himself. *Ely v. Hergerveil*, 325.
2. A purchaser under a mortgage is entitled to the benefit of such covenants as run with the land. *Id.*

CREDITOR
arrangement to detriment of surety: SURETYSHIP, 1,—**117.**
right to rely on personal responsibility as well as on LIEN, 1,—**6.**
See DEBTOR AND CREDITOR.

CRIMINAL LAW: *Jurisdiction of crimes*, 1; *merger of misdemeanor*, 2; *adultery*, 3; *conspiracy*, 4-12; *larceny*, 13; *enticing away female*, 14-17; *informations*, 2, 4-8, 18, 19; *examination after plea of guilty*, 20.
1. Offences committed at or within a point one hundred rods from the boundary between two counties may be prosecuted and punished in either county. *Bayliss v. People*, 221.
2. A misdemeanor is not merged in a felony in Michigan. Comp. L. § 7919. And where an information is filed for a misdemeanor and a felony is shown, and the case is left with the jury, no further prosecution for the misdemeanor can be had. *People v. Arnold*, 268.
3. A complaint for adultery between a married woman and an unmarried man may be made by the woman's husband. Comp. L. § 7693. *Bayliss v. People*, 221.
4. An information for conspiracy need not allege the means to be employed unless they constitute the only element of criminality. *People v. Arnold*, 268.
5. An information for cheating and defrauding by false pretences must specify the pretences used, but an information for conspiracy

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thereto need not allege the means, and the offence may be complete even though the pretences or the victims are not agreed on. *Id.*

6. An information for conspiracy need not allege an overt act in pursuance of it; and such an allegation, if made, does not aid a defective allegation of the conspiracy itself. *Id.*
7. Where a conspiracy to obtain property by false pretences, has been carried into effect, an information therefor should state against whom the conspiracy was directed. *Id.*
8. An information for conspiracy to obtain property by false pretences, should aver that the property belonged to some other person or persons than the conspirators. *Id.*
9. The misdemeanor of conspiring to obtain property by false pretences, may be tried wherever an overt act in pursuance of the conspiracy has been committed. *Id.*
10. Where a conspiracy to defraud involves the personation of defendant by wearing his clothes, it is admissible to show that the defendant had proposed the scheme to a person not named in the information, but that it had actually been carried out by the confederate named. *Id.*
11. A conspiracy may be shown by the detached acts and statements of the individual conspirators, and in a prosecution therefor the admissions of a confederate after the offence was committed are admissible to prove his own participation, the jury being cautioned not to permit his confessions to prejudice others. *Id.*
12. There can be no conviction for conspiracy aside from the confessions of individuals, unless there is independent evidence of the participation of the different persons charged. *Id.*
13. The fact that there was nothing to take is no defence to a prosecution for an attempt to commit a larceny from the person. *People v. Jones*, 441.
14. Comp. L. § 7533 providing for the punishment of any person who for purposes of prostitution shall entice away a female of less than sixteen from her father. mother, *guardian or other person* having the legal charge of her person, covers cases of girls who are living in a family with the knowledge of a parent who does not object, or who has delegated the charge of the girl to the head of the family. It also applies to girls who are not under strict legal guardianship, but are orphans or abandoned by their parents and are given a home by charitable persons. *People v. Carrier*, 442.
15. The statute punishing the enticing away of a female (Comp. L. § 7533) applies where the defendant accomplishes his purpose while he artfully avoids making her a direct proposition to go away with him. *Id.*
16. In a prosecution for enticing a female away for purposes of prostitution, evidence of previous illicit relations and of the subsequent conduct of the parties is admissible as bearing upon defendant's intent in enticing her away. *Id.*
17. Evidence of former illicit relations is significant though not conclusive evidence in its bearing upon the intent of one who is charged with enticing away a female for prostitution; but it may properly be dispensed with where proof of their subsequent conduct is conclusive as to the unlawful intent. *Id.*
18. The conclusion "against the form of the statute in such case made and provided" is mere surplusage, and does not determine that the information is for felony rather than a misdemeanor. *People v. Arnold*, 268.
19. An uncertain or ambiguous criminal charge cannot be supported by intendments. *Id.*

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20. An examination of a prisoner by the trial judge to ascertain whether his plea of guilty is voluntary is not necessarily defective because made in open court and in the presence of the prosecuting attorney, though there may be cases where it should be private. *Bayliss v. People*, 221.

gambling in wheat: ACTION, 2,—**447.**
proceedings for NUISANCE, 384–387,—**437.**
See BASTARDY.

CROP.
assumpsit for tenant's share: LANDLORD, ETC., 35,—**219.**

CROSS-APPEALS.
appeal bond, award of costs: COSTS, 7, 8,—**405.**

CROSS-BILL.
when unnecessary: MORTGAGE OF LANDS, 11,—**265.**

CROSS-EXAMINATION
as to offers to sell, value: EVIDENCE, 1,—**42.**
as to past life of WITNESS, 6,—**336.**
of plaintiff as to his estimate of damages: BRIDGES, 5,—**278.**
restriction, when not error: WITNESS, 9,—**95.**

CUSTOM
as to calling assistance in time of confinement: PHYSICIAN, ETC., 2,—**161.**

DAMAGE FEASANT.
animals taken: ANIMALS, 4–6,—**460**, **461.**

DAMAGES.
1. Where a person cuts timber in good faith, believing that he has a right to, the measure of damages is the difference between the values of the land with the timber standing, and with the timber removed; or it is the amount of injury caused by defendant's going on the land and cutting and removing the timber as a continuous act; and the increased value of the trees, caused by defendant in converting them into logs, should not be included. *Thompson v. Moiles*, 42.
2. Damages for injury to a mill-owner by hindering him in June from getting logs down stream to supply his mill, include also the resulting injury of keeping his mill idle during later months. *Richards v. Johnston*, 297.
3. The measure of damages in trover for the conversion of logs purchased in good faith from willful trespassers who have put them afloat, is their value when first taken under defendant's control. *Tuttle v. White*, 485.
4. The opinions and estimates of eye witnesses acquainted with the premises and the surroundings are admissible to show the extent of damage done by overflowing land. *Enright v. Hartsig*, 469.

assessment of, in replevin for animals taken *damage feasant:* ANIMALS, 6,—**461.**
costs, how far separable from: COSTS, 1,—**25.**
counted on alone, when costs excessive: JUSTICE OF THE PEACE, 5,—**25.**
determine jurisdiction: COURTS, 1,—**241.**
estoppel from claiming: BRIDGES, 4,—**278.**
for delay costs as: PRACTICE, 9,—**453.**
for intrusion on case of confinement: PHYSICIAN, ETC., 1,—**160.**
lie for injury discovered long after the act: ACTION, 1,—**160.**
for removing timber: TRESPASS, 4,—**42.**
from unauthorized bridge, effect of legalizing statute: BRIDGES, 2, 3,—**278.**
not assessed in Supreme Court: PRACTICE, 19,—**83.**

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recoverable where libel is not false: LIBEL, 3,—**408.**
plaintiff's estimate of: BRIDGES, 5,—**278.**
when interest not allowed as: INTEREST, 2,—**193.**
DEATH
of complainant, abatement of suit for DIVORCE, 2,—**511.**
DEATH-BED ASSIGNMENTS.
See GIFT, —**166, 167.**
DEBTOR AND CREDITOR.
1. Where an assignee for the benefit of creditors has assumed the trust, his omission to file a bond within ten days for its faithful execution, as required by Act 193 of 1879, does not render the assignment absolutely void, but only voidable, and creditors may proceed by bill in equity for the enforcement of the trust. *Fuller v. Hambrouck*, 78.
2. Where unwritten arrangements for the transfer of title are such that, if violated, proceedings would lie to vindicate them as against actual or constructive fraud, and where they are carried into execution and cease to be executory before the grantor's liability to a third person is perfected, it is doubtful how far the latter can set up previous informalities against the deed in a proceeding to set it aside as in fraud of creditors. *Victor Sewing Machine Company v. Jacobs*, 494.

bill in aid of execution: EQUITY, 7-12,—**243, 244, 397.**
bill to set aside deed: EQUITY, 13, 14,—**492.**
creditors' rights after dissolution of CORPORATIONS, 5,—**482.**
debtor's deed of HOMESTEAD, 1,—**244.**
accommodation acceptance: BILLS AND NOTES, 1-3,—**1.**
levy on previously conveyed land: EXECUTION, 4,—**308.**
purchase by judgment creditor of mortgaged lands at sale on EXECUTION, 12, 13,—**558, 559.**
question of fraud in MORTGAGE OF CHATTELS, 1-6,—**135.**
quieting wife's title against husband's creditors: HUSBAND, ETC.,—2,—**324.**
satisfaction of one mortgage by giving another: MORTGAGE OF CHATTELS, 7,—**29.**
validity, as against execution creditor, of MORTGAGE OF CHATTELS, 6,—**315.**
DECEIT
intrusion on case of confinement: PHYSICIAN, ETC., 2,—**161.**
DECLARATION
before justice, for overflowing lands: PLEADING, 2,—**469.**
for false warranty: PLEADING, 3,—**103.**
for railway injury, averment of NEGLIGENCE, 6,—**533.**
on joint obligation, proof: PLEADING, 7,—**141.**
may be served by private persons: PRACTICE, 1,—**141.**
service beyond jurisdiction: PRACTICE, 1,—**141.**
sufficiency, when not affected by demurrer: PLEADING, 4,—**469.**
waiver of objection to, by PLEADING, 1,—**25.**
DECLARATIONS
what ones not to be treated as *res gestae*: LIBEL, 2, —**341.**
DECREE
affirmance in doubtful cases: APPEAL, 9,—**394.**
alteration on *ex parte* application: SPECIFIC PERFORMANCE, 6,—**518.**
neglect to obey, when no action for: SPECIFIC PERFORMANCE, 6,—**518.**
delay in attacking decree of DIVORCE, 2, 3,—**511.**
of foreclosure, application of rent on: MORTGAGE OF LAND, 12,—**539.**
personal, on foreclosure, collection of deficiency: MORTGAGE OF LAND, 25,—**301.**

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relation back: SPECIFIC PERFORMANCE, 5,—**330.**
what is open to review on APPEAL, 8,—**587.**

DEED.

1. A conveyance is not invalidated by the fact that the plat of land referred to in the description is not recorded, or that so much of the description as refers to the plat is incorrect: the land may be identified by parol evidence. *Wiley v. Lovely*, 88.
2. A deed described the land conveyed as lot 77 of the original plat of the village as recorded. The original plat only contained twenty-nine lots, and another plat, which was not so executed as to entitle it to record, incorrectly designated the land referred to as lot 78. Still another plat, which was not recorded, contained the lot, and it was shown that it had been held, taxed and dealt with for more than twenty-five years as lot 77. *Held*, that the error in description did not invalidate the conveyance. *Id.*
3. On a bill to set aside a deed for the grantor's incompetency, the burden of proving incompetency is upon the complainant, whose case fails if the evidence is so evenly balanced as to leave the question in doubt. *Gibbons v. Dunn*, 146.

administrator's bill to set aside: ESTATES, ETC., 4,—**33.**
assignment of grantee's right of action on COVENANTS, 1,—**325.**
bill to set aside for fraud: EQUITY, 7, 14,—**243, 397, 494.**
construction of grants: GRANT, 1,—**303.**
estoppel to show suppressed deed: ESTOPPEL, 5,—**398.**
grant in, of right of way: EASEMENT, 5, 6,—**303.**
of homestead, by debtor: HOMESTEAD, 1,—**244.**
presumed to cover buildings: REAL PROPERTY, 1,—**389.**
quitclaim to mortgagee, priority: MORTGAGE OF LAND, 7,—**540.**
set aside, accounting under: EQUITY, 2-4,—**587.**
sheriff's, on foreclosure, defective: MORTGAGE OF LANDS, 23, 24,—**107.**

DEFAULT.

judgment by, on joint liability: JUDGMENT, 1,—**141.**
rights of party in: SPECIFIC PERFORMANCE, 3, 4,—**290.**

DEFICIENCY

between lots, apportionment of: REAL PROPERTY, 9, 10,—**605.**
collection of, restrained: MORTGAGE OF LAND, 25,—**301.**
execution for, in foreclosure, practice: MORTGAGE OF LAND, 26-31,—**489, 490.**

DELIVERY

proof of, of MORTGAGE OF LAND, 1, 2,—**393.**

DEMURRER

for objection to pleading: EJECTMENT, 6,—**87.**
See PLEADINGS, 4,—**469.**

DEPOSITION.

1. *It seems* that non-resident commissioners of deeds, appointed by the Governor to act in other States, are not authorized to take depositions for use in civil cases; and depositions purporting to be taken by virtue of their authority are inadmissible.—BY GRAVES, J. *Wattles v Mors*, 52.
2. Circuit Court Rule 51 provides that all objections to the form of a deposition shall be deemed waived if not filed and served within two days after notice that the deposition has been received. A deposition was taken under a stipulation that the notary who should take it should certify that he was not of counsel nor in any manner interested for either party. It was only certified that he did not act as counsel for either party; but notice being given under Rule 51, no objection was filed nor any motion made to strike the deposition from the files. *Held*, that there was no error

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in refusing to exclude the deposition on the ground that the certificate did not go far enough. *Edwards v. Heuer*, 95.
error in receiving, when no reversal: CERTIORARI, 10,—**52.**
in divorce suits, must be signed: DIVORCE, 1,—**68.**
minutes of stenographer do not have force of: EVIDENCE, 3,—**95.**
DESCRIPTION.
effect of misdescription in levy: EXECUTION, 5,—**91.**
in application for INSURANCE, 6,—**15.**
misdescription in mortgage aided by possession: HOMESTEAD, 3,—**91.**
misdescription not invalidating deed: DEED, 1, 2,—**83.**
sufficiency of, in contract for sale of lands: STATUTE OF FRAUDS, 2, 3,—**610.**
DETROIT.
approval of resolutions, absence of mayor: MUNICIPAL CORPORATIONS, 2, 3,—**213.**
authority to repave STREETS, 10,—**120.**
DEVISE.
oral promise for: WILL, 1,—**62.**
DISCHARGE
of old debt by new securities: PAYMENT, 1, 2,—**30.**
of surety: SURETYSHIP, 1,—**117.**
DISCONTINUANCE
as to joint promisor: PRACTICE, 5, 6,—**141.**
DISCRETION
as to amendment in EJECTMENT, 6,—**87.**
of town board of health in location of CEMETERY, 2,—**542.**
to award costs in appeal cases: COSTS, 3,—**306.**
to dismiss proceedings in GARNISHMENT, 1,—**28.**
DISQUALIFICATION
by personal interest, from acting on board: SCHOOLS, ETC., 3,—**127.**
DISSOLUTION
of irregularly incorporated company, creditors' rights: CORPORATIONS, 5,—**482.**
DITCHES.
See DRAINS AND DITCHES.
DIVORCE.
1. Testimony in a divorce suit, taken out of court, before a circuit court commissioner should be read over to the witnesses for correction and authentication by their signatures; and this precaution should not be waived unless in cases of absolute necessity. *Looker v. Looker*, 68.
2. The death of the complainant in divorce extinguishes the suit and the whole ground of action; and though the proceeding itself survives, a defendant who has taken no appeal from a decree granted therein cannot obtain by petition a standing in court for the purpose of attacking the decree, and can only do so, if at all, by a new suit impleading the parties representing the property interests to be affected. *Zoellner v. Zoellner*, 511.
3. An unexcused delay of nine years, and until after the death of the other party, in attacking a decree of divorce, is fatal to a proceeding to set it aside for the purpose of obtaining an interest in decedent's estate. *Id.*
4. A decree of divorce may be affirmed even though the evidence on which it was granted is so conflicting that different tribunals might come to opposite conclusions. *Corrie v. Corrie*, 235.
5. Where the appellate court is in doubt what decree ought to have been made in a divorce case, a decree dismissing the bill will not be disturbed, especially where the evidence bearing most strongly against the defendant is of occurrences which took place several years before. *McGonegal v. McGonegal*, 66.

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6. Costs and other allowance *denied* in such a case, though the wife was the successful party. *Id.*

DOCUMENTS
record defective in: PRACTICE, 8,—**121.**
necessity of proof of: PRACTICE, 7,—**120.**

DOGS
tax upon, valid: ANIMALS, 2, 3,—**183.**

DOMESTIC RELATIONS.
1. Where an uncle furnishes board and clothing to a minor nephew who afterwards becomes his ward, the liability therefor is a debt for necessaries and does not properly spring from the relation of guardian and ward. *Bondie v. Bourassa*, 321.
2. A man is not entitled as of course to charge his sister for board while living in his house. *Martin v. Sheridan*, 93.

debts for necessaries previous to guardianship: GUARDIAN, ETC., 8,—**321.**
father's agreement to deed land: SPECIFIC PERFORMANCE, 1,—**112.**

DOWER
before assignment, widow may bring EJECTMENT, 1,—**74.**

DRAFT
See BILLS AND NOTES.

DRAINS AND DITCHES.
1. Proceedings to lay out a ditch are fatally defective if there is no affirmative showing that notice was given of the application to the probate court for the appointment of commissioners to assess damages, and of their appointment. *Reinig v. Munson*, 138.
2. A man was sued for overflowing plaintiff's land by obstructing a ditch. His wife and child were the persons who filled it up, but when the plaintiff cut trenches to let off the water, defendant himself filled them up again, threatened those who were sent to re-open them and asserted his purpose not to let the main ditch be cleared for less than $1500; there was some evidence that he also knew where his wife was when she was at work. *Held*, that the jury were justified in finding him responsible for the mischief. *Enright v. Hartsig*, 469.

certiorari to review, delay in suing out: CERTIORARI: 4, 5,—**335.**

DRUNKENNESS
of servant, evidence of knowledge: MASTER, ETC., 5,—**177.**

DURESS
compulsion of jury: TRIAL, 16,—**623.**

EASEMENT.
1. An easement whereby water collecting upon land must be allowed to find an outlet, even though it overflows adjacent land, may be acquired by prescription; and evidence is admissible as to the length of time it has so overflowed without objection from the adjacent proprietor. *Conklin v. Boyd*, 56.
2. An easement created by grant is not lost by neglect of enjoyment for twenty years or more, in the absence of any evidence of occupancy adverse to it. *Day v. Walden*, 575.
3. Whether the owner of an easement who has permitted another without objection to make valuable erections which cannot be enjoyed consistently with his use of the easement, is not by his apparent acquiescence estopped from claiming the easement afterwards—Q. *Id.*
4. An easement to take water on one tenement to be used for operating a mill on another, when created as an easement appurtenant to the mill and not to any described parcel of land, is lost when the mill goes to decay or is destroyed and not rebuilt. *Id.*

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5. A "right of way of an alley" included in a deed implies *ex vi termini* a passage leading away from the land conveyed. *McConnell v. Rathbun*, 303.
6. The grantor of a corner lot afterwards deeded an adjoining lot and included "the right of way of an *alley* 10 feet wide on rear end of said 82 feet,"—the length of the lots conveyed. Such a passage-way actually existed from the street, and the land in the rear of both lots was under the grantor's control. *Held*, that the easement included in the second deed could not be limited to a mere open space behind the lot, and that the subsequent obstruction of the outlet to the alley by persons holding under the grantor, would be enjoined. *Id.*

EDUCATIONAL PURPOSES.
government donation of land for: GRANT, 2-4,—**636.**

EJECTMENT.
1. In Michigan a widow may bring ejectment for her undivided interest without waiting to have her dower assigned her. She has a present possessory claim capable of enforcement. *Moody v. Seaman*, 74.
2. A mortgagee cannot take or hold possession before foreclosure without the consent of the mortgagor or his assigns. But where he is deliberately and intentionally put in possession by the mortgagor, his possession is rightful, and ejectment cannot be brought against him without some action previously taken which will terminate his right and render his continuance in occupancy wrongful. *Reading v. Waterman*, 107.
3. Guardians for nurture have no right of possession of their ward's lands, and cannot bring ejectment for it. *Kinney v. Harrett*, 87.
4. Ejectment, in Michigan, determines the title; so that no one is authorized to sue in the right of another who has the legal title. But one may recover on showing a mere right to possession, in cases where such a right is evidence as against the defendant that the plaintiff has a legal estate of some description. *Id.*
5. A landlord may recover in ejectment against his tenant after the tenancy has expired, on no other showing than the recognition of title which is always implied in a tenancy. *Id.*
6. A guardian by appointment is not authorized, in Michigan, to bring ejectment in his own name for lands owned by the ward; but where the ward's title is fully set forth in the declaration, and the guardian is only a nominal party, the objection to the pleading should be taken by demurrer, and it is within the discretion of the court to permit an amendment. *Id.*

ELECTION
of alderman, common council the final judge: MUNICIPAL CORPORATIONS, 1,—**138.**

EMBEZZLEMENT
of pension money: WITNESS, 6,—**336.**

EMINENT DOMAIN
taking land for RAILROAD COMPANIES, 1,—**190.**

ENTICING AWAY FEMALES: see CRIMINAL LAW, 14-17,—**442, 443.**

EQUITY: *Abatement*, 1; *accounting for rents and profits*, 2-6; *bill in aid of execution*, 7-12; *bill to set aside deed*, 13-14; *clearing and quieting title*, 15, 16; *joint suits*, 17, 18; *diligence required*, 19.
1. The mere abatement of a suit in equity is a state of suspension with capacity for revival. *Zoellner v. Zoellner*, 511.
2. Where the heirs of a grantor obtain a decree setting aside the deed, the accounting for rents and profits to which they may be entitled should date from the grantor's death when the heirs

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would have become entitled to the property; but if the deed was obtained by unconscionable means and the defendants purchased with notice, the accounting may properly begin at the date of the deed itself when the grantor came into possession and enjoyment of the property. *Huck v. Norris*, 587.

8. The rule of law whereby a liability for *mesne* profits is limited to the period of the statute of limitations does not necessarily apply to an accounting for rents and profits under a decree setting aside a deed, but as complainants are bound to do equity as a condition of relief the accounting may cover the entire period during which the defendant has held the property. *Id.*
4. An accounting for rents and profits on one side and for taxes and necessary expenses on the other cannot be so allowed as to cover one period for one party and another for the other. *Id.*
5. Where a commissioner was ordered on an accounting to compute the amount due with interest and the parties waived the computation of interest, there is no ground for an exception as to the allowance of interest. *Id.*
6. Interest upon rents of property and the unpaid value of its annual use during such time as it is not rented is properly chargeable in a decree for an accounting against defendants who had obtained the property by unconscionable means and whose deed is vacated by the decree. *Id.*
7. A bill in aid of execution to set aside a deed as fraudulent as against the complainant, should show how it is so, and is too general if it merely alleges the fraud. But if the defendant does not object on the hearing, the defect is not open on an appeal. *Rhead v. Hounson*, 243.
8. An allegation of defendant's insolvency is not indispensable to a bill filed to set aside a deed as an obstacle to an execution. The fact of insolvency is important only as it bears on the question whether or not the deed is fraudulent as against the creditor who has made levy. *Id.*
9. Allegations that defendant has not sufficient personal property in the county to pay the judgment and that the officer made an effort to find such goods, are not necessary to a bill in aid of execution. *Id.*
10. Neglect to make due search for goods and chattels on which to levy, is a defect to be corrected in the court whence the writ issued, and is not open in a court of chancery under a bill in aid of an execution upon land. *Id.*
11. A bill in aid of execution was filed against land which had been sold in contemplation of the issue of the execution. The land included a homestead, and the purchaser redeemed it from a mortgage against the judgment debtor. *Held* that the redemption raised an equity in the purchaser's favor; but as it benefited the homestead as well as the rest, the amount of land subject to sale on execution was what was left after setting apart the homestead parcel and so much besides as was found on appraisal of the whole to be worth that proportion of the redemption money which was paid to release the homestead. Interest on the mortgage was not allowed where it did not clearly appear that the purchaser had not paid it, and it was shown that he had the use of the land long enough to counterbalance his claim therefor. *Id.*
12. Where a bill in aid of execution is filed to reach land which has been previously conveyed without fraudulent intent, the grantee's right must be determined by the original nature of the transactions, and cannot be made to depend on later dealings with other lands which are not involved in the litigation. *First National Bank of Kalamazoo v. McAllister* 397.

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13. Where a bill to set aside a deed sets up arrangements which are admitted and which do not appear, as alleged, to be lacking in any legal formalities, it must be assumed that they are legal and could be proved if not admitted. *Victor Sewing Machine Co. v. Jacobs*, 494.
14. A decedent's estate was bid in on foreclosure for the benefit of the widow and heirs, and the purchaser conveyed it to the widow for the benefit of an invalid son to whom, in pursuance of this arrangement, she afterward conveyed the title thus received. Meanwhile she became liable as a surety, and her creditors having obtained judgment against her in a suit brought after these arrangements were carried out, filed a bill to set aside the deed to her son. *Held*, that he had prior equities and that the bill must be dismissed. *Id.*
15. A bill to clear title cannot be maintained if at the time of filing it the complainant is not in actual possession of the premises, and especially if a suit at law is pending to settle the right of possession. *Page v. Montgomery*, 51.
16. A bill to quiet title as against an indefinite claim was properly sustained where the proofs showed that defendant had tried to sell the land under an invalid levy against complainant's husband, and that the certificate of sale had been filed with the register of deeds. *Woodworth v. Gorton*, 324.
17. Joint suits will not lie in a case in which there is no common interest on one side or the other. *Brunner v Bay City*, 236.
18. A joint bill of complaint cannot be maintained if any one of the complainants alleges a grievance that is not of the same common nature with those of the rest. *Id.*
19. Peace and good order require that equity shall not aid those who grossly neglect to take care of their own rights. *Zoellner v. Zoellner*, 511.

accounting, not to disturb compromise: PARTNERSHIP, 5,—**173.**
administrator's claims for indemnity: ESTATES, ETC., 5,—**385.**
clearing title from tax sale to State: TAXATION, 18,—**256.**
injunction against location of CEMETERY, 1-4,—**542.**
foreclosure in: see MORTGAGE OF LAND, 17,—**31.**
neglect to obey decree changed *ex parte*: SPECIFIC PERFORMANCE, 6,—**518.**
no appeal from consent order: APPEAL, 7,—**130.**
release by *cestuis que trustent*, of MORTGAGE OF LANDS, 11,—**265.**
use of original minutes of testimony in printing record: APPEAL, 5,—**112.**
what is open to review on APPEAL, 8,—**587.**
when creditor may proceed in, to enforce assignee's trust: DEBTOR AND CREDITOR, 1,—**78.**
See SPECIFIC PERFORMANCE.

ERROR
final judgment on, upon CERTIORARI, 9,—**52.**
frivolous assignments, costs as damages: PRACTICE, 9,—**453.**
in assessment, when not presumed: STREETS, 2,—**150.**
in receiving deposition, when no reversal: CERTIORARI, 10,—**52.**
in refusing special questions: SURETYSHIP, 2,—**117.**
prejudicing jury: TRIAL, 11,—**44.**
rectified by remitting excessive COSTS, 2,—**25.**
tacit allowance of irregularities: TRIAL, 10,—**44.**
what errors not reviewed on special APPEAL, 1,—**35.**

ESTATES OF DECEDENTS.
1. A personal claim that has not been allowed against an estate is not valid as against infant heirs. *Wohlscheid v. Bergrath*, 46.

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2. One who has been compelled to pay a certain sum on behalf of persons who, when it should be paid, would be entitled to indemnity therefor from an estate, is entitled to be subrogated to the latter's rights and may file his own claim, for the amount he has paid, directly against the estate. *Miller v. Campau*, 148.
3. Commissioners on the estate of a deceased person cannot allow contingent claims; they can only receive and report the evidence relating thereto, and such claims are not definitely adjudicated until they are supposed to have become absolute. *Id.*
4. A bill filed by an administrator to subject property once owned by his intestate to the payment of demands against the estate, will not lie where the bill itself tends to show that the property was disposed of without fraud as against creditors; as where deeds were given in escrow for the purpose of distributing the property among the grantor's heirs without will or administration, and with the reservation of a power to destroy the papers at any time. *Crittenden v. Basom*, 33.
5. An administrator filed a bill for indemnity from the estate, or from the widow and heirs, alleging that by the advice of the judge of probate he had turned the property over to the widow and heirs, believing that they would take care of debts remaining unpaid; that he had received his discharge but was afterwards cited to show why a particular claim had not been paid; that the judge of probate decided that the estate could not be re-opened and he must resort to equity; and that he had himself paid the claim. *Held*, that the administrator had disregarded the statutory provisions governing the management of estates, and that the case was not within any head of equity; and the bill was dismissed. *Breining v. Schneider*, 385.

beneficiary fund not assets: MUTUAL BENEFIT ASSOCIATION, 1,—**429.**
bill to set aside deed as in fraud of creditors: EQUITY, 14,—**494.**
guardian's sale to pay claims, without ward's authority: GUARDIAN, ETC., 4,—**46.**

ESTOPPEL.

1. A firm of commission brokers, having settled with a grain dealer with whom they did business, solicited his farther shipments. He replied that he did not know when he should resume business, but suggested they should correspond with his brother, whose initials, he said, were the same as his own. The brokers understood this to mean that he intended to remain out of business for a time, and they wrote him informing him how they understood his letter, and stating that they had solicited his brother's consignments, but he made no reply. He soon resumed control of the business, however, but kept his brother in his employment without notifying the brokers of the new arrangement. His own name was Oramel and his brother's, Osmyn. The brokers having entered upon the suggested correspondence, transacted considerable business with Osmyn, in whose charge the business had been left, and who was acting, as they supposed, as principal, but really as agent. In the course of these dealings they realized a certain profit on a car load of wheat received from him, and they bought a quantity of wheat at his request. They also lent him a large sum of money, and soon after discovered that he had never been the principal in the business, and that before borrowing the money he had left his brother's employment. Oramel offered to take the wheat they had bought, off their hands, but they refused, expressing a willingness to hold it until it should rise in value. They also retained the profit on the car load they had sold, to apply on the account for money lent to Osmyn, and Oramel sued them for it. *Held* (1), that as his own course had misled the brokers into supposing that

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they were dealing with Osmyn as a principal, and he had neglected to inform them differently, he was estopped by his own negligence from objecting to their applying the proceeds of the sale upon Osmyn's debt, and from claiming the proceeds on the ground that the car load belonged to himself; (2) that the brokers, in merely expressing a willingness to hold the wheat they had bought until it rose, did not waive any existing lien upon it, and as there was no consideration for a waiver, and no promise to waive the lien was asked or obtained, the brokers were at liberty to stand on their rights as they were when they first learned that the business carried on by Osmyn was that of his brother. *Stebbins v. Walker*, 5.

2. The State is not concluded by the mere non-action of one of its officers, if he has not ascertained the facts and passed judgment. *Lake Shore & Mich. Southern Ry. Co. v. People*, 193.
3. One who had contracted to put in logs, afterwards brought suit upon the *quantum meruit*, and it appeared that his daughter, acting as his clerk had drawn the orders upon which the wages of the men were paid by the employer. *Held*, that plaintiff could show that he had no knowledge of the form of the orders, as in that case they could not tend to show that he was not acting merely as defendant's agent, and there was nothing in their payment by defendant to estop plaintiff from showing the circumstances under which they were drawn. *Boyce v. Martin*, 239.
4. An estoppel is not established if the evidence fails as to any essential element of it, but if there is more than a scintilla of evidence to establish it, the court will not inquire into its weight. *Maxwell v. Bay City Bridge Co.*, 278.
5. One who has deliberately obtained an apparently legal transfer of land with intent to have the legal title placed in some one else, and that for good reasons, and without fraud or deceit being practiced on him, cannot afterwards assail the transfer by parol evidence and show a former deed to himself which he had suppressed, without recording, in order to have the land reconveyed. *First Nat. Bk. of Kalamazoo v. McAllister*, 397.

against corporation, to repudiate its paper: CORPORATIONS, 4,—**482.**
by marriage, from contesting mortgage: HUSBAND AND WIFE, 1,—**294.**
by taking compensation for condemned land: TRIAL, 5,—**432.**
from claiming damages for proximity of BRIDGES, 4,—**278.**
from claiming EASEMENT, 3,—**575.**
from enforcing payment, casual admission: BILLS AND NOTES, 2,—**1.**
shown by parol, cannot pass title to land: REAL PROPERTY, 4,—**398.**
to set up tax title against mortgagee: MORTGAGE OF LAND, 16,—**418.**

EVIDENCE.

1. Witnesses as to value can base their opinions on actual sales of which they have knowledge, but can hardly be cross-examined as to what they have offered to sell similar property for. *Thompson v. Moiles*, 42.
2. The testimony of one who swears that he knows another's handwriting either from having seen him make his signature, or from business correspondence apparently signed by him, is competent in proving the latter's indorsement. *Empire Mnfg. Co. v. Stuart*, 482.
3. Act 8 of 1879, authorizing the minutes of the official stenographer to be used in settling a bill of exceptions, does not give them the character of depositions or of record evidence generally. *Edwards v. Heuer*, 95.

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as to competency of servant: NEGLIGENCE, 4; MASTER AND SERVANT, 1-5,—**176, 177.**
as to fair dealing, transfers of mortgages: GIFT, 1-5,—**166, 167.**
as to orders for payment: ESTOPPEL, 3,—**239.**
as to physician's medical standing: LIBEL, 11,—**409.**
as to reputation for truth and veracity: WITNESS, 3,—**219.**
as to time of flowage: EASEMENT, 1,—**56.**
as to value of injured cattle: ACTION, 4,—**241.**
burden of proof of fair dealing: GIFT, 1, 2,—**166, 167.**
burden of proving grantor's incompetency: DEED, 3,—**146.**
certificate of registry as: MORTGAGE OF LAND, 8,—**521.**
commissioners of deeds not to take DEPOSITION, 1,—**52.**
conclusion on validity of judgment put in: PRACTICE, 16,—**389.**
depositions must be signed: DIVORCE, 1,—**68.**
estimate of damage from overflowing land: DAMAGES, 4,—**469.**
evasiveness in testifying: GIFT, 2,—**167.**
examination as to conversations: AGENCY, 1,—**453.**
extrinsic, contract of sale: STATUTE OF FRAUDS, 2, 3,—**610.**
force and effect, when for the jury: PRACTICE, 28,—**596.**
in action for injury to property from neighboring structures: BRIDGES, 5-7,—**278.**
in action for libel: see LIBEL.
in action for municipal negligence: STREETS, 12, 14,—**516.**
in case of intrusion at time of confinement: PHYSICIAN, ETC., 2,—**161.**
incompetency of, as to private expenditures: MASTER, ETC., 13,—**629.**
in settlement with employee for expenses: MASTER, ETC., 13,—**629.**
in suit against guardian for appropriating money left with ward: GUARDIAN, ETC., 5,—**93.**
necessity of proof of documents: PRACTICE, 7,—**120.**
of conspiracy: CRIMINAL LAW, 10-12,—**269.**
of former illicit relations: CRIMINAL LAW, 16, 17,—**443.**
of jurisdiction, certified transcript: JUSTICE, ETC., 6,—**320.**
of plaintiff's PARTNERSHIP, 3,—**52.**
of publication of notice of sale: MORTGAGE OF LAND, 19,—**418.**
of satisfaction of debt, new securities taken: PAYMENT, 2,—**30.**
offers of testimony: TRIAL, 6, 7,—**629.**
opinion as to value of services: MASTER, ETC., 10,—**416.**
parol, as to trustee in BANKRUPTCY, 3,—**420.**
parol, to identify premises: DEED, 1,—**83.**
parol, cannot assail title to REAL PROPERTY, 4,—**398.**
parol, when cannot assail transfer of land: ESTOPPEL, 5,—**398.**
proof of delivery of MORTGAGE OF LAND, 1, 2,—**393.**
restriction on cross-examination: WITNESS, 9,—**95.**
to establish ESTOPPEL, 4,—**278.**
use of original minutes of testimony in printing record: APPEAL, 5,—**112.**
weight of, is for the jury: BRIDGES, 5,—**278.**
not weighed by Supreme Court in law cases: PRACTICE, 25-28,—**416, 455, 488, 596.**
what inadmissible as *res gestæ*: LIBEL, 2,—**341.**
witness cannot be asked what he stated in affidavit. WITNESS, 5,—**161.**
See BURDEN OF PROOF; PRESUMPTIONS; WITNESS.

EXAMINATIONS
on plea of guilty, by trial judge: CRIMINAL LAW, 20,—**222.**

EXCEPTIONS
as to allowance of interest on accounting: EQUITY, 5,—**587.**

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cannot rest on general findings or deductions: PRACTICE, 21, 22, —**551.**
indiscriminate, to charge, how treated: TRIAL, 13,—**623.**
to judgment: PRACTICE, 12, 14, 15,—**432.**
EXECUTION: *Exemption from*, 1; *levy*, 2–7; *notice of sale*, 8, 9; *sale*, 10–13.

1. Seed wheat being necessary to the business of wheat farming is material which, within the limits defined by Comp. L., § 6101, is exempted from execution against the farmer. *Stilson v. Gibbs*, 215.
2. A deputy sheriff having levied upon wheat in the mow, threshed and removed it before selling it, and in an action of trespass on the case for unlawful seizure and sale sought to justify by showing that when he had levied on a former crop under the same judgment the defendant had removed it in the night. But as it appeared on cross-examination that it was removed by the holder of a chattel mortgage thereon it was *held* that the justification, if it was one, failed and that the evidence should have been stricken out. *Id.*
3. Placing a keeper in charge of property under levy is a sufficient precaution for its protection unless violence is apprehended. *Id.*
4. Judgment creditors levying upon land that has been previously conveyed in good faith on both sides, obtain by their levy no better title than is held by the debtor. *First Nat. Bk. of Kalamazoo v. McAllister*, 397.
5. It seems that a levy on property misdescribed therein is no better than a conveyance or mortgage which misdescribes it. *Beyschlag v. Van Wagoner*, 91.
6. The amount due on a justice's judgment is a jurisdictional fact in proceedings to levy on land under a transcript of the judgment, but it may be stated in the affidavit for the transcript, required by Comp. L. § 5382, to be filed with the justice, and if so set forth and promptly filed with the transcript in the office of the clerk of the circuit court, it need not be again stated in a separate affidavit to be filed with the clerk as provided in § 5383. *Smith v. St. Joseph Circuit Judge*, 338.
7. An affidavit of amount due is good if filed without such delay a would give rise to a presumption that payment had been made since it was sworn to, and it is generally good, if filed on the day after it was made. *Id.*
8. Where a constable has levied execution under a justice's judgment, the rights acquired by the levy are not lost by his delay in advertising the sale of the property taken, if requested not to do so by a mortgagee who intends to replevy it, or by some one authorized to represent the mortgagee. *Baldwin v. Talbot*, 19.
9. Delay in giving notice of an execution sale is prejudicial to the execution debtor if to any one, and may be such as to entitle him to apply for *mandamus* to compel the officer to proceed. *Id.*
10. Where a constable levies a justice's execution upon mortgaged property, he must levy on the whole and sell it in one parcel subject to the mortgage; and if he does not find it all together, he must have time after levying on part to find and levy on the remainder, if within his bailiwick. *Id.*
11. Where notice of a levy on real estate is filed under Act 5 of 1875, a delay of five years in making sale does not avoid the levy if the judgment creditor has acted in good faith; and a levy and sale made meanwhile cannot affect it. *Ward v. Citizens' Bank*, 332.
12. Complainant having a judgment against A. caused execution to be levied on lands and a sale made at which he became the purchaser. The land was duly conveyed to him in pursuance of this sale after time for redemption had expired. He then filed his bill

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in equity against A. & B., alleging that previous to his levy A. had given to B. a mortgage on the lands for a considerable sum, fraudulently and without consideration, and in order to defeat complainant in the collection of his judgment, and he prayed a decree setting it aside as a cloud on his title. From the evidence it appeared that complainant knew of the existence of the mortgage when he made his levy, but that when sale was made there was no notification of any intent to contest the mortgage, and the sale proceeded in all respects as it would have done if the mortgage was uncontested. *Held*, that under such circumstances the complainant must be deemed purchaser of the equity of redemption only. *Messmore v. Huggard*, 558.

13. If complainant proposed to contest the mortgage after becoming purchaser it was his duty to have notice given at the time of the sale, so that parties concerned would understand what was claimed and proposed, and could take their measures accordingly; and so that any other persons who might propose to become bidders should be put upon a par with complainant in respect to knowledge of the interests which were offered for sale. A sale at which others would understand they were bidding for the equity of redemption only, but at which complainant would be bidding for an unencumbered title, would be inadmissible, because opposed to the policy of the law which favors full and free competition. *Id.*

bill in aid of: EQUITY, 7-12,—**243**, **244**, **397**.
exemption from, of HOMESTEAD, 2,—**389**.
for deficiency on foreclosure: MORTGAGE OF LAND, 26-31,—**489**, **490**.
fraudulent, of bond: BOND, 1; SURETYSHIP, 4,—**424**.
levy against husband, quieting wife's title: EQUITY, 16; HUSBAND, ETC., 2,—**324**.

EXEMPTION
of homestead from execution: HOMESTEAD, 2,—**389**.
of seed wheat from EXECUTION, 1,—**215**.

EXPENSES.
accounting for, time covered by: EQUITY, 5,—**587**.

EXTENSION OF TIME
in proposal to sell: SALE, 2,—**610**.

FALSE PRETENCES: see CRIMINAL LAW, 5-10,—**268**.

FALSE WARRANTY.
declaration for: PLEADING, 8,—**403**.

FELONY.
no merger of misdemeanor in: CRIMINAL LAW, 2,—**269**.

FINAL JUDGMENT
dismissal of appeal from probate: APPEAL, 4,—**496**.

FINDINGS
absence of, judgment not rendered: PRACTICE, 17,—**83**.
exceptions cannot rest on general findings: PRACTICE, 21,—**551**.
exception that findings do not support judgment: PRACTICE, 14,—**432**.
refusal to find, when not a mistrial: PRACTICE, 18,—**83**.
of jury, no review on error: PRACTICE, 23,—**292**.
of necessity of abatement of NUISANCE, 4,—**437**.

FIRE INSURANCE: see INSURANCE, 1-6,—**15**.

FIXTURES
levy upon, of ATTACHMENT, 2,—**249**.

FLOWAGE
easement for, established by prescription: EASEMENT, 1,—**56**.

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FORCIBLE ENTRY AND DETAINER.

1. A complaint under the Forcible Entry and Detainer Act alleged that complainant was the landlord of the premises described, and respondent the tenant thereof; that respondent holds said premises unlawfully and against the right of said complainant, who is entitled to the possession of them in her own right and as guardian of the minor heirs of a designated person. *Held*, sufficient. *Moody v. Seaman*, 74.
2. The Forcible Entry and Detainer Act does not contemplate summary proceedings to recover the possession of land unless the demandants represent the entire interest. *Id.*
3. Tenants in common of the whole estate can join in summary proceedings to recover its possession. *Id.*
4. An intestate's widow and the heirs at law represent the whole possessory estate, and where the widow has the right of possession in behalf of the heirs, and thus represents the whole title, she can bring summary proceedings to recover its possession without waiting for the assignment of her dower to her. *Id.*
5. Proceedings under the Forcible Entry and Detainer Act may be brought against one who is in possession either as a contract purchaser, or as a lessee, and who being in default, is a tenant at will and liable to be ousted on notice. *Id.*

FORECLOSURE
purchaser can sue on what COVENANTS, 2,—**325.**
see MORTGAGE OF LAND, 17—31.

FOREIGN CORPORATIONS
effect of permission to operate: CORPORATIONS, 2,—**224.**

FOREIGN JUDGMENT
certified transcript as evidence: JUSTICE, ETC., 6,—**320.**
identity of person sued on transcript: NAME, 2,—**320.**

FORFEITURE
of personal lease, by assignment: LANDLORD, ETC., 6,—**311.**

FORTHCOMING BOND: see ATTACHMENT, 2-4—**249.**

FRAUD
bill to set aside deed for: EQUITY, 7-14,—**243, 244, 494.**
burden of showing fair dealing: GIFT, 1, 2,—**166, 167.**
debtor's deed of homestead is not: HOMESTEAD, 1,—**244.**
guardian's sale without ward's authority: GUARDIAN, ETC., 4,—**46.**
in execution of appeal bond: SURETYSHIP, 4,—**424.**
evidence, if fraudulent, execution is for jury: BOND, 1,—**424.**
in MORTGAGE OF CHATTELS: 1-6,—**135, 315.**
of creditors: DEBTOR AND CREDITOR, 2,—**494.**
upon mortgagee, by record of later mortgage: MORTGAGE OF LAND, 7,—**540.**

FRAUDS, STATUTE OF: see STATUTE OF FRAUDS.

GAMING
loan to aid in making corner in wheat, no ACTION, 2,—**447.**

GARNISHMENT.

1. Where proceedings in garnishment are based upon an affidavit that is jurisdictionally defective, but the garnishee appears and discloses assigned claims in which he has no personal interest, it is within the court's discretion to dismiss the proceedings on motion made by the garnishee, before judgment is entered in the principal case, especially if the affidavit is not amended after notice to dismiss, and the garnishee's conduct has not caused prejudice. *Conway v. Ionia Circuit Judge*, 28.
2. An affidavit for a writ of garnishment is fatally defective if it does not show the nature of the contract by which the principal

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defendant is bound, or identify it with the cause of action in suit. *Id.*

3. A garnishee who has only disclosed claims of creditors held under assignment wherein he has no personal interest, can be held only upon the trial of an issue, which is not ripe for trial before judgment in the principal case. *Id.*
4. A recovery for libel does not furnish an indebtedness which can be garnished until judgment is entered on the verdict. *Detroit Post & Tribune Co. v. Reilly*, 459.

GIFT.

1. Successive transfers of property consisting of mortgages were procured by a nephew from his uncle within a few days before the latter's death and while he was in an enfeebled condition. The uncle was 82 years old, had made his home with his nephew and was said to be estranged from his other near relations. He was a temperate and thrifty bachelor who had little society. The nephew was neither temperate nor thrifty. *Held* that as the assignments were made on the donor's death-bed, and in the absence of all near relations except the beneficiary, they were open to suspicion, and on a bill to set them aside the beneficiary had the burden of showing their fairness. *Duncombe v. Richards*, 166.
2. Where one who has the burden of showing fair dealing is evasive in his testimony he increases the burden and it is no excuse that he was afraid of being entrapped by counsel. *Id.*
3. The question in determining whether a gift has been made is not what the donor had contemplated or intended, but whether his intentions were carried into effect; and to accomplish this an intelligent will directing or assenting to the act done, is essential. *Id.*
4. On a bill to set aside transfers of mortgages made on the grantor's death-bed and claimed by the transferee to have been made as a gift, testimony that the donor, though shown to be a prudent and sensible man, had confidentially disclosed to inferiors and strangers what he intended to do with his property, can give little support to a suspicious case; nor can testimony that he had once handed over to the transferee a box of mortgages, saying "I give you all my personal property," there being no reason to suppose that he afterwards considered himself divested of the property or that the supposed donee considered himself owner; nor can testimony that after the transfers were made the donor was heard to say that the donee should have his property when he was done with it. *Id.*
5. Where an acknowledging officer, when summoned to attest the transfer of property procured by the transferee under suspicious circumstances, neglects to carefully investigate the condition of things in the beneficiary's absence, his testimony that the donor seemed to be in full possession of his faculties is less satisfactory than if he had taken such precautions. *Id.*

by State, of land for educational purposes: GRANT, 2-4,—**636.**

GOOD FAITH

no bearing, in action for actual damages: BRIDGES, 6,—**278.**

GRADING.

assessment for grading STREETS, 1,—**150.**

GRAND RAPIDS.

city physician, vacancies in office: MUNICIPAL CORPORATIONS, 4, 5,—**467.**

GRANT.

1. All grants must be construed reasonably and in the light of the circumstances. *McConnell v. Rathbun*, 303.
2. A grant of land was made by the State to an educational corporation, and by the grant it was provided that the proceeds should be

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devoted exclusively to the erection of buildings for the use of the corporation. A bond was given by individuals to the State to secure the performance of this provision. By consolidation with another corporation the donee secured all the buildings it needed, and afterwards appropriated the proceeds of the lands to its general needs. The sureties in the bond to the State then filed a bill to restrain the misappropriation. *Held*, that the bill should not be sustained. *Kiefer v. German American Seminary*, 636.

3. The design of the donation was to secure to the donee buildings for its corporate use; and if the corporation secured all it needed, it would be immaterial that they were secured by the donation of friends, or by the use of moneys before in its possession, instead of using the precise moneys received on sale of the land. And it is equally immaterial that the buildings were obtained without the use of any moneys. *Id.*
4. The State intended its donation to be beneficial, and it is not to be presumed that it would present to the donee under any circumstances the alternative of expending the donation in useless buildings or forfeiting it. The State had a particular benefit in view, and is interested only in seeing that that benefit is secured. *Id.*

GUARANTY.

1. A guaranty of payment for goods to be sold "from time to time" to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it. It would be different if the guaranty contemplated a single transaction. *Crittenden v. Fiske*, 70.
2. Where a guaranty of payment is absolute in its terms and waives notice of times or amounts of sales or of defaults or delays in payment, the guarantor is not entitled to notice of its acceptance. *Id.*
3. An absolute guaranty of payment for future purchases binds neither party until it has been acted on, and until then it may be withdrawn, or delivery of goods may be refused even though verbally promised. *Id.*
4. Making sales in reliance on a guaranty of payment, amounts to an acceptance of it. *Id.*

GUARDIAN AND WARD: *When guardianship exists*, 1–3; *sale of ward's lands*, 4; *inventory of assets*, 5, 6; *settlement of account*, 7, 8.

1. Guardianship in socage does not exist in Michigan. *Kinney v. Harrett*, 87.
2. All girls under sixteen and not leading depraved lives are presumptively in the legal charge of some one. *People v. Carrier*, 442.
3. Comp. L. § 4837, providing for the termination of guardianship by the marriage of a female ward, was amended by Act 2 of 1877, which provided that the marriage should not affect guardianship so far as property was concerned. *Held*, that as a law does not take effect until ninety days after the close of the legislative session unless otherwise provided, the amendment did not apply to a case where the ward was married just before the Act passed. *Wohlscheid v. Bergrath*, 46.
4. It is fraud in law, whatever the intent, for a guardian to petition in a ward's name, without the latter's authority, for leave to sell lands for the payment of claims against the estate of the ward's ancestor; and to include an invalid claim; and to represent the sale when made, as a cash sale, when no cash is paid. *Id.*
5. In a suit against a guardian for appropriating moneys left in the keeping of his ward, there is no error in excluding defendant's inventory of the ward's property filed in the probate court by him as guardian, or in rejecting the evidence of defendant's clerk as to

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what particular sums of money were included in the inventory, and as to defendant's good faith, especially if defendant does not offer to show that he has in good faith paid out the money for the ward's benefit, or done any act that would debar him from full protection on the settlement of his guardianship account in the probate court. *Martin v. Sheridan*, 93.

6. If a guardian in inventorying his ward's assets, in good faith includes the money of another, which he is afterwards compelled to pay over to the owner, the probate court can permit him to correct his inventory. *Id.*
7. If a guardian can include in the final settlement of his account a debt to him incurred by his ward before the guardianship began, he cannot do so where the debt had become barred by the statute of limitations before that period. *Bondie v. Bourassa*, 321.
8. Evidence that a minor was an admitted member of the same family as one who was afterwards made his guardian, and was provided for as such, during a period for which the guardian afterwards sought to charge him for board and clothing, is admissible in a proceeding for the settlement of the guardian's accounts. *Id.*

action for moneys left with ward: ASSUMPSIT, 2,—**93.**
debts for necessaries: DOMESTIC RELATIONS, 1,—**321.**
finding on settlement of account: APPEAL, 3,—**321.**
guardian for nurture cannot bring EJECTMENT, 3,—**87.**
guardian should not in his own name bring EJECTMENT, 6,—**87.**
guardianship of young girls: CRIMINAL LAW, 14,—**442.**
settlement of account, judgment against sureties on appeal bond: SURETYSHIP, 3,—**321.**

HANDWRITING
evidence as to, to prove indorsement: EVIDENCE, 2,—**482.**
HEARSAY
not admissible as *res gestæ*: LIBEL, 2,—**341.**
HEIR
accounting to, for rents and profits: EQUITY, 2,—**587.**
claim invalid as to minor heirs: ESTATES, ETC., 1,—**47.**
infant heirs not to pay COSTS, 12,—**429.**
HIGHWAYS: *Proceedings to take lands*, 1; *injuries from defects in*, 2.

1. An appeal to the township board from the decision of a highway commissioner in awarding damages for property taken for a highway is provided for by Comp. L. § 1264 (Act 216 of 1875); and if the only question is as to the amount of damages, *certiorari* will not lie to the commissioner to remove the proceedings to the Supreme Court, where no reason is given for not resorting to the remedy by appeal. *Detroit & Bay City R. R. v. Highway Com'r*, 642.
2. A township under the statute of 1879 (Gen. Laws, p. 223) is liable to a party who is injured by reason of a defect in a public highway along which he is passing. *Burnham v. Byron Township*, 155.

municipality liable for defects in: STREETS, 12–14,—**516.**
See STREETS.
HOMESTEAD: *Deed of*, 1; *exemption of*, 2; *mortgage of*, 3.

1. A deed of a homestead cannot be avoided as in fraud of the rights of a judgment creditor. The holder is as free to dispose of it as though he were not a debtor. *Rhead v. Hounson*, 248.
2. The homestead exemption from execution is an exemption of an entirety, though a homestead may also be claimed in lands held in joint tenancy and not exceeding the homestead limitation in quantity. *Tharp v. Allen*, 389.
3. Misdescription does not invalidate a mortgage of a homestead

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where it would not invalidate a mortgage of any other property, and where the premises can be identified by the aid of possession. *Beyschlag v. Van Wagoner*, 91.
redemption from mortgage, by purchaser: EQUITY, 11,—**244.**

HUSBAND AND WIFE.
1. One who marries the widow of a mortgager and goes into possession of the premises under an adverse title, does not hold in his wife's right and is not estopped by his marriage from disputing the mortgage. *Gorton v. Roach*, 294.
2. On a bill to quiet a wife's title to land upon which a levy had been made under a judgment against her husband, the suggestion that the husband's creditors may attack the wife's title is of no force where no such issue is raised by the answer and the defendant has not put himself in position to raise it on the proofs. *Woodworth v. Gorton*, 324.

conveyance to wife to cancel debt: REAL PROPERTY, 7,—**398.**
husband's responsibility for wife's acts: DRAINS, 2,—**469.**
who may make complaint for adultery: CRIM. LAW, 3,—**221.**
wife's consent not needed in conveyance of lessee's interest: LANDLORD, ETC., 4,—**389.**
See DIVORCE.

IDEM SONANS
Dixon for Dickson: MORTGAGE OF LAND, 18,—**107.**
Kenney and Kinney are: NAME, 1,—**87.**

IDENTIFICATION
of premises, by parol evidence: DEED, 1,—**83.**

IDENTITY
of defendant sued on foreign judgment: NAME, 2,—**320.**

IMPEACHMENT
by contradiction of WITNESS, 4,—**186.**

IMPLIED PROMISE
to pay INTEREST, 2,—**193.**

IMPROVEMENTS
public; see STREETS.

INCOMPETENCY
of grantor, burden of proof: DEED, 3,—**146.**

INDEMNITY
administrator's claim for: ESTATES, ETC., 5,—**385.**
bond, requirement to give: BILLS AND NOTES, 3,—**1.**
mortgage, when valid: MORTGAGE OF CHATTELS, 5,—**135.**

INDORSEMENT
testimony to prove: EVIDENCE, 2,—**482.**

INFANT
claim invalid as to minor heirs: ESTATES, ETC., 1,—**47.**
costs not granted against infant heirs: COSTS, 12,—**429.**

INFORMATION
ambiguous charges not cured by intendments: CRIMINAL LAW, 19,—**269.**
formal conclusion to: CRIMINAL LAW, 18,—**269.**
for conspiracy to cheat: CRIMINAL LAW, 4, 8,—**268, 269.**
for nuisance: NUISANCE, 1, 2,—**437.**

INJUNCTION
against collection of street tax: STREETS, 5; TAXATION, 145,—**150.**
against location of burying ground: CEMETERY, 1-4,—**542.**
of obstruction of outlet to way: EASEMENT, 6,—**303.**
of collection of deficiency on foreclosure: MORTGAGE OF LAND, 25,—**301.**

INNOCENT PARTIES
loss, which must suffer: NEGLIGENCE, 1,—**6.**

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INSOLVENCY
allegation of: EQUITY, 8,—**244.**
INSTRUCTIONS
refusal, when not error: TRIAL, 9,—**308.**

INSURANCE: *Who can obtain insurance*, 1, 7; *interest of assured*, 2–5; *description of risk*, 6; *life insurance*, 7.

1. The custodians of property, such as factors, agents or consignees, can have it insured for the benefit of present owners or notwithstanding changes of ownership. *Castner v Farmers' Ins. Co.*, 15.
2. An insurance policy may be taken jointly to secure property owned in severalty. *Id.*
3. A policy of insurance on property is good for all the owners for whom it is made though they have several as well as joint interests, and when it all belongs to the parties insured it makes no necessary difference to the insurer how their interests are apportioned. *Id.*
4. A person applying for insurance on property is not required by law to explain the exact state of the title nor the precise nature of his interest in it, if he is not distinctly required to do so by the company. *Id.*
5. A fire insurance policy stipulated that it should be void if the interest of the assured were other than "the entire, unconditional, free and unencumbered ownership." The applicant for insurance had only an undivided half interest in the property, having transferred the other half to his son, who had mortgaged it to his mother, and afterwards assigned it for the benefit of creditors. The applicant went to the assignee and to the mortgagee, to obtain their interests, and they told him verbally that he could have them, and upon these assurances he had the property insured. *Held* that, as no consideration appeared for the transfer of their interests, the policy was void. *Miller v Amazon Ins. Co.*, 463.
6. A fire insurance company, on being sued for a loss, cannot defend on the ground that the risk was increased by a neighboring dry-house which was not described in the application for insurance, where, in fact, the proof of loss showed its position, and the notice of refusal to pay treated it as included in the policy, but not properly heated, and did not rely upon undue concealment of its proximity. *Castner v. Farmers' Ins. Co.*, 15.
7. An insurance policy issued for the benefit of a person who is neither an heir nor a relation of the assured, and whose interest is not promoted by the latter's continuing alive, is in the nature of a wager policy, and void as against the public interests. *Mutual Benefit Association v. Hoyt*, 473.

INTENT
fraudulent, invalidating MORTGAGE OF CHATTELS, 2,—**135.**

INTEREST.

1. Interest may be reckoned on a judgment for costs when affirmed on *certiorari*. Comp. L. § 1635. *Whelpley v. Nash* 25.
2. Interest upon money withheld is allowed either because there is an express or implied promise to pay it, or as damages; but no promise can be implied until the principal falls due, and it is not allowable as damages if there has been no final understanding as to how much is to be paid. *Lake Shore & Michigan Southern Ry Co. v. People*, 193.
3. Interest upon the amount of a tax which it is claimed should have been paid, cannot be allowed where the amount claimed has never been levied and is not therefore in default. *Id.*
4. Interest will not be allowed on advances made under a contract, without an express agreement for it. *Boyce v. Martin*, 239.

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on accounting, waiver of exception: EQUITY, 6,—**587.**
on mortgage, refused after redemption by purchaser: EQUITY, 11,—**244.**
upon rents and profits, in accounting: EQUITY, 6,—**587.**
INVENTORY
of guardian, evidence of: GUARDIAN, ETC., 5,—**93.**
of guardian, amendment of: GUARDIAN, ETC., 6,—**93.**
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tacit allowance of: TRIAL, 10,—**44.**
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JOINDER
of complainants, when allowed: EQUITY, 17, 18; TAXATION, 5, 19,—**236.**
JOINT DEFENDANTS
service beyond jurisdiction: PRACTICE, 3,—**141.**
discontinuance as to joint promisor: PRACTICE, 5, 6,—**141.**
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JOINT INSURANCE: see INSURANCE, 2, 3,—**16.**
JOINT LIABILITY
for negligent collision: SHIPS, ETC., 3,—**596.**
JOINT TENANCY
homestead may be claimed of lands held in: HOMESTEAD, 2,—**389.**
JUDGE
examination by, as to plea of guilty: CRIMINAL LAW, 20,—**222.**
settlement of case after resignation of: MANDAMUS, 1,—**12.**
JUDGMENT.
1. Judgment by default on an allegation of joint liability does not admit any different liability. *Munn v. Haynes*, 140.
2. The result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents. *Lake Shore & Michigan Southern Ry. Co. v. People*, 193.
3. The judgment of a court of record in Michigan is good for ten years. *Ward v. Citizens' Bank*, 332.

action on, damages counted on alone: JUSTICE OF THE PEACE, 5,—**25.**
against sureties on appeal bond: SURETYSHIP, 3,—**321.**
certified transcript as evidence of jurisdiction: JUSTICE, ETC., 6,—**320.**
conclusion of fact on validity of: PRACTICE, 16,—**389.**
error cured by remitting excessive COSTS, 2,—**25.**
exceptions to: PRACTICE, 12, 14, 15,—**432.**
final, on CERTIORARI: 9,—**52.**
for abatement of nuisance: NUISANCE, 1,—**437.**
for costs, interest on: INTEREST, 1,—**25.**
identity of defendant: NAME, 2,—**320.**
in action for libel, garnishment of: GARNISHMENT, 4,—**459.**
issue of bonds to pay, power of MUNICIPAL CORPORATIONS, 6,—**565.**
levy on land under transcript of EXECUTION, 6,—**338.**
not invalidated by excessive COSTS, 1,—**25.**
not rendered in absence of finding: PRACTICE, 17,—**83.**
not reversed, clerical irregularity: JUSTICE OF THE PEACE, 3,—**25.**
stipulation of facts for: PRACTICE, 10,—**309.**
JUDGMENT CREDITORS
purchase of mortgage lands at sale on EXECUTION, 12, 13,—**558, 559.**

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of incidents of railway travel: NEGLIGENCE, 11,—**498.**
of mode of railroad management: RAILROAD COMPANIES, 7,—**259.**
JURISDICTION
as affected by amount in controversy: COURTS, 1; REPLEVIN, 2,—**241.**
certified transcript as evidence of: JUSTICE, ETC., 6,—**320.**
municipal corporations can sue before JUSTICE, ETC., 1,—**428.**
of crimes at or near boundary: CRIMINAL LAW, 1,—**222.**
of Supreme Court to review law cases: PRACTICE, 11,—**432.**
of transitory actions against non-residents: ACTION, 6,—**552.**
service beyond: PRACTICE, 1-3,—**141.**
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cannot pass on sufficiency of complaint: BASTARDY, 3,—**186.**
challenge of juror: TRIAL, 2-4,—**408, 442.**
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excusing juror: TRIAL, 1,—**442.**
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objections to juror's competency: TRIAL, 5,—**432.**
reading prejudicial matter to: TRIAL, 11,—**44.**
refusal to submit special questions: SURETYSHIP, 2,—**117.**
JUSTICE OF THE PEACE.
1. A justice of the peace can hear a suit brought by a municipal corporation. *Hart v. Port Huron*, 428.
2. A justice of the peace must wait for the defendant for an hour after the time fixed for hearing, in any cases in which the plaintiff is allowed that time by Comp. L. § 5373. *Bossence v. Jones*, 492.
3. A justice's neglect to record in his docket the place to which a case is adjourned, is a clerical irregularity for which judgment cannot be reversed if the defendant is not misled and appears and answers. *Whelpley v. Nash*, 25.
4. A justice before whom a suit was begun fell sick and directed it to be tried before another justice who had jurisdiction over the subject-matter. *Held*, that as the parties appeared on the adjourned day and tried the case on the merits without objection, they waived all questions of regularity and the judgment was binding. *Smith v. St. Joseph Circuit Judge*, 338.
5. In an action on a justice's judgment the damages may be counted on alone if the award of costs is excessive and illegal. *Whelpley v. Nash*, 25.
6. A properly certified transcript of a justice's judgment rendered in another State on personal service and appearance, is sufficient evidence of the justice's jurisdiction. Comp. L. § 5933. *Campbell v. Wallace*, 320.

affidavit of amount due on judgment: EXECUTION, 6, 7,—**338.**
as temporary secretary of township board: TAXATION, 6,—**526.**
declaration for overflowing land: PLEADING, 2,—**469.**
discretion in awarding costs in appeal cases: COSTS, 3,—**306.**
judgment not invalidated by excessive COSTS, 1,—**25.**
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special appeal from: see APPEAL, 1, 2,—**35.**
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by sureties, of bond under LIQUOR LAW, 1,—**98.**
for newspaper libel: LIBEL, 2,—**341.**
of libel, in criminal prosecution: LIBEL, 3,—**408.**
of unlawful levy: EXECUTION, 2,—**215.**

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LACHES
in attacking decree of DIVORCE, 2, 3,—**511.**
in suing out CERTIORARI, 3-5,—**191, 335.**
LAKE SHORE & MICHIGAN SOUTHERN R. R. CO.
taxation of: TAXATION, 11-16,—**193, 224.**
effect of consolidation: RAILROAD COMPANIES, 2,—**193.**
LAND CONTRACT
ouster by act of purchaser: REAL PROPERTY, 2,—**330.**
See SPECIFIC PERFORMANCE.
LANDLORD AND TENANT.
1. A tenant at will can waive notice to quit. *Moody v. Seaman*, 74.
2. Where a sufficient notice to quit has been given and the tenant has promised to leave at a fixed date, a repetition of the demand does not impair the effect of the original notice. *Id.*
3. After a lease was cancelled the landlord told the tenant to put in and harvest fall wheat and promised that he should have his just and lawful share of it, but afterwards harvested and kept it himself. *Held*, that they were tenants in common of the wheat under a valid agreement and that the tenant could maintain *assumpsit* on the common counts for the value of his share. *McLaughlin v. Salley*, 219.
4. A lessee can convey his interest as such without his wife's consent. *Tharp v. Allen*, 389.
5. A lease upon shares is a personal contract and not assignable where the amount of rent received must depend on the character and skill of the lessee, or where it gives the lessee the use of lessor's tools on condition that they may be properly kept. *Randall v. Chubb*, 311.
6. A personal lease is forfeited by an assignment and attempt to give the assignee possession, and the lessor may take immediate steps to recover the premises. *Id.*

landlord's action against tenant, in EJECTMENT, 5,—**87.**
rights of mortgagees under paid up lease given as additional security: MORTGAGE OF LAND, 12,—**539.**
son held to have a lessee's interest: REAL PROPERTY, 3,—**389.**
See FORCIBLE ENTRY AND DETAINER.
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picking an empty pocket: CRIMINAL LAW, 13,—**441.**
LEGISLATURE
power to authorize change of salary: OFFICER, 3,—**22.**
power to change salaries of public OFFICER, 5,—**478.**
effect of statute legalizing BRIDGES, 1-3,—**278.**
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against husband, quieting wife's title: HUSBAND, ETC., 2,—**321.**
effect of misdescription: EXECUTION, 5,—**91.**
officer's negligence in making: EQUITY, 10,—**244.**
upon fixtures, of ATTACHMENT, 2,—**249.**
of execution: see EXECUTION.
LIBEL.
1. It is libelous to publish of a lawyer an article charging him with giving dishonest, unprofessional advice, with making false statements in professional dealings, with incurring loss of confidence by misconduct, with embezzling moneys, and with making false charges for services and extorting excessive compensation. *Atkinson v. Free Press*, 341.
2. A lawyer brought an action for libel based on a newspaper article which charged him with having appropriated more than a fair share of the moneys which a client had caused to be placed in his charge just after departing for a foreign jurisdiction where his creditors could less easily trouble him. Under a plea of justifica-

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tion evidence was admitted of the statements of a couple of creditors who had pursued their debtor and who professed that he had intimated some suspicion as to the safety of his funds. There was no evidence that plaintiff had done anything to have the money sent back to him, but the evidence was admitted as *res gestæ* and on the ground that the lawyer and client and the go-between who carried the money were "all together in the transaction." *Held*, error; such declarations could not be treated as *res gestæ;* nor could the conduct of creditors among themselves out of the plaintiff's presence and not communicated to or acted on by him. *Id.*

3. In a criminal prosecution for libel, the truth alone, if not published with good motives and for justifiable ends, is not always a complete defence. *Sullings v. Shakespeare*, 408.
4. In a civil action for libel no damages are recoverable for a libel that contains no falsehoods. *Id.*
5. Where a declaration for a libel published in a daily newspaper, does not aver its publication in the weekly edition, an offer to prove the circulation of the weekly is properly rejected until proof is made that it was published in that edition. *Id.*
6. In an action for newspaper libel an offer was made to show that the declaration was afterward published with head lines referring to plaintiff's attorney but not to the plaintiff. *Held* proper to exclude proof of the head lines. *Id.*
7. Repetition of a newspaper libel may be shown by proving the publication of the declaration containing the libelous articles in full. *Id.*
8. In a civil action for newspaper libel, the defendant, who was publisher of the paper, was properly allowed to state, on cross-examination, that the article complained of was not written by him. *Id.*
9. In a civil action for libel based on a newspaper squib making game of the plaintiff, it is competent for the defendant to show how far the facts alleged or any part of them were true, and how far their truth would leave any cause of action remaining. It is also admissible to show under what circumstances the article was prepared and published. *Id.*
10. Where an action of libel is based on a newspaper squib, and there is evidence tending to show that it arose out of a mutual banter, and that defendant told plaintiff he was going to publish it and that plaintiff assented, it is for the jury to find under proper instructions whether the article is really libelous even though it would be if unexplained. *Id.*
11. Where a physician complaining of a libel claims that it injures his medical character, evidence as to his medical standing becomes relevant. *Id.*
12. A civil action for newspaper libel was based on the publication of an article shown by defendant to have been handed to him for publication by plaintiff himself, but which was illegibly written, and was not published as written; there was no showing that it had been intentionally altered nor any plain proof of negligence; and it was also shown by defendant that plaintiff had said he would be satisfied if it could be corrected and put in the weekly edition. Plaintiff did not deny this and was not examined as to the article, and there was no testimony indicating what words were changed. *Held*, that the article could not go to the jury as a basis of damages. *Id.*
13. A printer's mistakes made without wrongful intent in printing a self-laudatory article furnished for publication by the subject of it, cannot be held a malicious libel. *Id.*

garnishment of recovery on: GARNISHMENT, 4,—459.

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LIEN.
1. Where liens on property are accompanied by a personal responsibility, the creditor has a right to rely on both. *Stebbins v. Walker*, 5.
notice of prior lien: MORTGAGE OF LAND, 5,—**394.**
of vendor: VENDOR'S LIEN, 1,—**131.**
waiver of: ESTOPPEL, 1,—**5.**
LIFE INSURANCE
wager policy void: INSURANCE, 7,—**473.**
LIMITATION OF ACTIONS: see STATUTE OF LIMITATIONS.
LIMITED LIABILITY ACT OF CONGRESS
does not apply on streams connecting the lakes: SHIPS, ETC., 4,—**596.**
LIQUOR LAW.
1. A liquor dealer's bond, where the penalty has by mistake been left in blank, will be held valid at the lowest statutory penalty, when the sureties have justified at that sum in accordance with the statute requiring the justification to conform to the penalty. *Garrison v. Steele*, 98.
2. Such a bond in Bay City cannot be enforced until approved by the common council; the report of a committee approving it will not be sufficient unless the report is adopted by the council. *Id.*
LOAN.
agent in taking: MORTGAGE OF LAND, 3, 4,—**393**, **394.**
extortion of *bonus*, effect as evidence: MORTGAGE OF LAND, 4,—**394.**
taxation of railway company for: TAXATION, 11, 12,—**193.**
effect of consolidation of RAILROAD COMPANIES, 2,—**193.**
LOGS AND LOGGING
damages for conversion of logs: DAMAGES, 3,—**485.**
damages to mill owner from delaying logs: DAMAGES, 2,—**297.**
evidence as to orders for payment: ESTOPPEL, 3,—**239.**
quantum meruit on logging contract: ASSUMPSIT, 3,—**239.**
LOG-DRIVING COMPANIES
are not common CARRIERS, 1,—**38.**

MAJORITY
of board, when action legal: STREETS, 8,—**151.**
MANDAMUS.
1. Mandamus to settle a case for review will not issue to a judge who has resigned since filing his answer to the order to show cause. Relief should be asked from his successor. *DeHaas v. Newaygo Circuit Judge*, 12.
costs against circuit judge: COSTS, 14,—**496.**
to proceed with sale on EXECUTION, 9,—**19.**
MARRIAGE
of female ward, as terminating guardianship: GUARDIAN, ETC., 3,—**46.**
MASTER AND SERVANT: *Care in employment of servant*, 1–5; *negligence of fellow servant*, 6–9; *value of services*, 10, 11; *overpayment to employee*, 12, 13.
1. The negligence of a servant in a particular instance cannot well be shown by testimony of his incompetency or carelessness on other occasions; but if it is also shown that the master knew of the cases or that they were of such a character and so frequent that he must have known of them, he, the master, may be chargeable with negligence in retaining such servant. *Michigan Central R. R. Co. v. Gilbert*, 176.
2. Where an employer has shown due care in the choice of his servants, no presumption of the latter's unfitness arises afterwards; but if it appears that a servant has been repeatedly guilty of care-

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lessness or incompetency it is for the jury to determine whether the master knew of it or would have known if he had exercised ordinary care. *Id.*

3. Evidence that a railroad employee is hasty, passionate and excitable does not of itself necessarily show that he is unfit for the post of yardmaster; nor does the mere fact that he has sent an engine upon the track when a coming train was overdue conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Id.*
4. A locomotive engineer's opinion that if he had obeyed the order of the yard-master to place his engine on the main track when a coming train was past due, he would have gotten into trouble, was *held* inadmissible to show that the railroad company was negligent in keeping the yard-master in its employment unless the case had been brought to the knowledge of the company officers. *Id.*
5. Where the officers of a railroad company have had their attention directed to the intemperate habits of an employee, it is their duty to make careful and frequent investigation as to the fact if they retain him in their service. The weight and importance of evidence that they knew of it, is for the jury to pass upon. *Id.*
6. A brakeman in coupling freight cars had his arm crushed by a loosened dead-wood on a car which had come from another road. It was the business of inspectors employed on both roads to see that cars transferred were in proper condition, and there was no claim or showing that they were not competent. *Held* that the inspector was a fellow servant of the brakeman and that the risk of error on his part was one of the risks of the brakeman's employment, and that the brakeman could not recover against the company for the injury. *Smith v. Flint & Pere Marquette Rw.*, 258.
7. Conductors and brakemen are fellow servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers. *Id.*
8. Actions by employees against their employer for injuries caused by fellow servants are based on the actual negligence of the defendant or of some representative who is held in law to personate him; and where the business requires the employment of many servants beyond the possible constant supervision of either the employer or of such representative, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. *Id.*
9. When a master has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them. *Id.*
10. The admission of the opinion of a witness living in one place as to the value of services performed at another is not error where there is nothing to show that he did not know the value of labor at the latter place or the comparative value of wages at both. *Kent Furniture Mfg. Co. v. Ransom*, 416.
11. Where a company contracts to pay an employee "the same wages as shall be paid to other men in the employ of the company filling similar positions," and the laborer sues for compensation and there is no showing that the company had other employees in similar positions, the plaintiff is entitled to prove what his services were worth. *Id.*
12. In an action by a firm of merchants against their traveling man to recover money overpaid to him in refunding his traveling expenses, the action being based on the theory that he had reported his expenses as larger than they actually were, it was not error to exclude evidence of the actual expenses of other traveling men

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over the same route in the same years, and that they were much less than were charged by defendant. Such matters are *res inter alios acta*, and if the circumstances are not identical they cannot be relevant. *Linn v. Gilman*, 628.

13. In an action by employers against an employee for money claimed by the plaintiffs to have been paid him on false statements of his account against them, testimony to show that defendant has expended more than his salary besides supporting his family, and that he had no other source of revenue is properly excluded, as there can be no presumption that he has wrongfully obtained so much as was not paid him in wages. *Id.*

MASTER OF VESSEL
responsibility for safe management: SHIPS, ETC., 1,—**596.**

MAYOR
absence of, approval of resolutions: MUNICIPAL CORPORATIONS, 2, 3,—**213.**

MEETINGS
of board, action of majority: STREETS, 8,—**151.**
power to appoint a temporary secretary: CORPORATIONS, 3,—**526.**

MERGER
of misdemeanor in felony: CRIMINAL LAW, 2,—**269.**

MESNE PROFITS
liability covers what period: EQUITY, 3,—**587.**

MISDEMEANOR
not merged in felony: CRIMINAL LAW, 2,—**269.**
where may be tried: CRIMINAL LAW, 9,—**269.**

MORTGAGE OF CHATTELS: *Fraud*, 1-6; *satisfaction*, 7.

1. A mortgage is not fraudulent that is taken without fraudulent intent to secure no more than the mortgager's actual debt. *Adams v. Niemann*, 135.
2. A partially wrongful purpose may invalidate a mortgage; and when taken by two mortgagees, the honesty of one will not help it if the other commits any fraud or wrong in taking it. *Id.*
3. A mortgage to several persons jointly may be made to cover separate debts. *Id.*
4. A mortgage is not necessarily made directly to the beneficiary; the security is always made in trust to secure obligations, and the trust and beneficial interest need not be in the same hands; a mortgage to a third person is as valid as if made to a creditor. *Id.*
5. An indemnity mortgage is valid if honestly and fairly given; and if merely an indemnity to the extent of securing the mortgager's debts more directly, and made with the express concurrence of the creditors who hold them, it is not void as against creditors. *Id.*
6. A chattel mortgage in fraud of an execution creditor is nevertheless valid if given to secure an honest debt and taken in good faith. *Andrews v. Fillmore*, 315.
7. A debtor gave a note for his indebtedness and a chattel mortgage upon his horse. The indebtedness increased and he gave another mortgage upon other property. Meanwhile he sold the horse. Afterwards his creditor expressed the opinion that the mortgages had become void, and asked for a new mortgage on the same and other property. When this was given the original note was surrendered. The debtor objected to including the horse in the latest mortgage, claiming that he understood that mortgage was taken in place of the others, but the agent for the creditor insisted and he included it. The agent afterwards took the horse on the first and third mortgage, and the purchaser brought replevin for it. *Held*, that it could not be said that the court erred in so instructing the jury as to leave them to decide whether the giving of the

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new mortgage and the surrender of the note were meant to operate as payment of the original mortgage, especially as the bill of exceptions did not contain all the testimony, and there might have been other evidence to support the charge delivered *Brown v. Dunckel*, 29.

by contract purchaser: SALE, 3,—**102.**

levy on, of justice's EXECUTION, 10,—**19.**

mortgagee cannot sue for conversion, in ASSUMPSIT, 1,—**531.**

ownership of the young of mortgaged ANIMALS, 1,—**131.**

MORTGAGE OF LAND: *Delivery*, 1; *priority*, 2–7; *record*, 8–10; *release*, 11; *application of rent*, 12; *tax payments*, 13, 14; *purchase of tax titles*, 15, 16; *foreclosure*, 17–31.

1. Where a mortgager testifies in general terms that he *gave* the mortgage at a specified time, and is not questioned as to the particulars of delivery, this testimony must be regarded as showing *delivery* at that time. *Matteson v. Blackmer*, 393.
2. A complainant in foreclosure desired to show that the mortgage held by him was delivered and recorded before another one of previous date held by a person who had died before the suit was begun; and he sought to show it by the testimony of a witness who claimed the decedent had told him his mortgage was neither acknowledged nor delivered until the other was put on record. The witness had lived five or six miles from decedent, and was not shown to have been his confidant. Complainant had a mortgage on the lands of the witness. *Held*, a suspicious circumstance that he had never mentioned his conversation with decedent in the latter's lifetime, nor until after complainant's suit had been pending seven years, and that complainant had called upon him just before he was sworn, to know if he was possessed of valuable information. *Id.*
3. Where a son acts for his father in procuring a mortgage, undertakes the whole negotiation, decides upon the security, satisfies himself as to the title, attends to the execution of the papers, receives the money from his father and pays it over to the mortgager,—in short, does everything an agent could do, and his father accepts the benefits of the transaction, he may properly be regarded as his father's agent in spite of his testimony to the contrary, especially if he admits being his agent just before and just after these acts; it is idle under such circumstances for him to claim to have been agent for the person giving the mortgage. *Id.*
4. Extortion of a *bonus* from the borrower of money is too common a procedure on the part of the lender's agent, to be very significant for the purpose of showing that he was the borrower's agent rather than the lender's. *Id.*
5. The fact that the value of land is not enough to secure two loans is significant, but not conclusive, evidence that the second mortgagee had notice of the prior lien. *Id.*
6. "Land-poor" is understood to mean that one has a great deal of unproductive land, and perhaps that he has to borrow money to pay taxes. But a man land-poor may still be responsible. *Id.*
7. A mortgager and his grantee conspired to cheat the mortgagee thus—The grantee quitclaimed to him in satisfaction of his foreclosure decree and the mortgager then recorded a later mortgage from the grantee to himself before the quitclaim deed could be recorded. *Held*, that the later mortgage should have been set aside and the quitclaim deed permitted to stand. *Corey v. Alderman*, 540.
8. The certificate of the registry of a mortgage, required by Comp. Laws § 4229, to be indorsed thereon, is evidence of its record. *Jakway v. Jenison*, 521.

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9. Where the record of the assignment of a mortgage is duly witnessed and recorded, it cannot be assumed that it was not properly recorded. *Id.*
10. It *seems* the foreclosure of a mortgage cannot be defeated by presumptions in favor of an issue made by a subsequent encumbrancer as to the assignment of the mortgage, if such encumbrancer had not relied upon the records or upon inquiry in taking an interest in the premises in suit. *Id.*
11. A mortgage to secure the payment of certain judgments was given to a trustee for the benefit of different judgment creditors, each of whom already held separate mortgages on other property securing the same judgments. The holder of an interest in parcels covered by all these mortgages negotiated for a release and obtained one which purported to discharge from the earlier mortgage only, but which was evidently understood by all parties to release from the later one also. The creditors afterwards obtained an assignment from the trustee and sought to foreclose. *Held*, that a release by the *cestuis que trustent* was good in equity and discharged the later mortgage; that their bill should be dismissed and that a cross-bill was not necessary for establishing a defence thereto. *McBride v. Wright*, 265.
12. Where a paid-up lease for a certain period was given to mortgagees as additional security, and the mortgagees had the option to hold over on paying a fair rental, the foreclosure of the mortgage would not prevent them from resorting to any additional security they might have, and they would have a right to apply the amount of rent due from them and unpaid, in satisfaction of their debt; and if the mortgager should assign his claim for rent to a third person, the latter would have no better right than his assignor and could not recover it until the foreclosure decree is extinguished. *Storey v. Dutton*, 539.
13. On foreclosure for non-payment of taxes as they fell due the mortgagee claimed to recover as taxes paid by himself, certain sums paid by his agent in bidding in the property at tax sales. *Held*, that such payments were not, in contemplation of law, payments of the taxes, and could not be included. *Maxfield v. Willey*, 252.
14. When a mortgagee instead of paying taxes due, purchases the land at a tax sale, the mortgager can treat the purchase as a payment and compel the cancellation of the tax certificate or deed on refunding the amount paid, with interest. But it cannot against his will be held a payment in his behalf. *Id.*
15. Neither party to a mortgage can cut off the other's interest by bidding in the premises at a tax sale, if the other objects thereto. *Id.*
16. One who indemnifies a mortgagee against a tax-title cannot afterward set up the tax-title against his title as purchaser on foreclosure. *Wyman v. Baer*, 418.
17. Notice of a statutory foreclosure must in all things required by statute conform to the statutory provisions. But where it contains all that the law requires it will not be void for errors in other respects which are not misleading: Lee v. Clary 38 Mich. 223 affirmed. *Reading v. Waterman*, 107.
18. A notice which identifies a mortgage by date and parties and accurately describes the time and place of its record, is not rendered invalid by calling a name *Dixon* which should be *Dickson*, nor by having the date of the mortgage given once correctly and once incorrectly, inasmuch as it furnishes the means of its own correction. Neither is a notice, if published for the proper time and giving the proper time and place of sale, invalidated by an error of date. *Id.*

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19. In ejectment by a purchaser on foreclosure the original affidavit of publication showed that the notice of sale was insufficient, but another affidavit was produced, correcting the first, and the publisher gave evidence tending to show that the sale was regularly advertised, and that the original affidavit was incorrect. *Held*, that the testimony was admissible, but that it was for the jury to pass on, and could not be treated as conclusive by the court. *Wyman v. Baer*, 418.
20. A release of a parcel of land from a mortgage does not defeat the right to sell the rest of the mortgaged premises under a power of sale. *Durm v. Fish*, 312.
21. Mortgaged premises may be sold as a single parcel where they were so mortgaged, even though they have been since subdivided by the mortgager but without the mortgagee's concurrence; but where the parties have joined in obtaining the release of a parcel so situated as to leave the rest in distinct parcels and thus affect the security, the sale is void if not made in parcels. *Id.*
22. A mortgager in possession under color of title is presumed in the absence of evidence to the contrary, to be owner of the inheritance, and a purchaser on valid foreclosure acquires the same interest which he holds. *Wyman v. Baer*, 418.
23. A sheriff's deed on foreclosure is not made invalid by an error in setting forth the date of a mortgage, which is so described otherwise as to be clearly identified. The statute does not prescribe the form of such a deed. *Reading v. Waterman*, 107.
24. The statute itself fixes the time of redemption on foreclosure, and a certificate which fixes an impossible time will not destroy the validity of the foreclosure. *Id.*
25. Certain persons agreed with the defendant in a mortgage foreclosure, to purchase the property at its foreclosure sale, if they could do so for a certain sum, and afterwards to release the interest so acquired, upon payment, by defendant, of a certain amount. The premises were actually bid off to others for a sum that was less than the amount due, but was nearly enough to pay what the other parties to the agreement were entitled to thereunder, and although not parties to the foreclosure, the latter applied for and obtained an order on which execution was issued for the deficiency. The defendant had been brought into court on the original foreclosure by personal service, but had allowed the bill to be taken as confessed and knew nothing of the proceedings subsequent to the sale. *Held*, that he could maintain a bill to restrain the collection of the deficiency, as in fraud of the agreement made. *Smith v. Smith*, 301.
26. Execution for deficiency can issue against the defendant in foreclosure only on a sworn petition or application in writing, reciting the facts which give the right to it, and praying the court to direct its issue. *Ransom v. Sutherland*, 489.
27. An application for the issue of an execution for deficiency on foreclosure must be served, wherever practicable, on the defendant against whom the relief is sought, and notice must be given him of the time when the application will be presented; if personal service cannot be had, the court may direct substituted service on a showing of the facts. *Id.*
28. A defendant in foreclosure against whom execution is sought for a deficiency can resist the application only on grounds that are not inconsistent with the decree and such as usually operate in its discharge. *Id.*
29. An answer to an application for an execution for deficiency on foreclosure must state the grounds of objection thereto, and must be sworn to and placed on file. *Id.*

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30. If an answer to an application for an execution for deficiency on foreclosure presents matter of discharge, complainant may take issue on it, and in proper cases the court may order a reference to take proofs. *Id.*
31. A decree in foreclosure adjudging defendant personally liable for a deficiency, taken together with the report of the deficiency, make out a *prima facie* case against him; and on resisting an application for an execution against him he has the burden of showing matter in discharge of the decree. *Id.*

assumpsit against collecting agent: AGENCY, 1,—**453.**
bill to set aside assignments of: GIFT, 1-5,—**166, 167.**
estoppel by marriage, from contesting: HUSBAND AND WIFE, 1,—**294.**
purchase of mortgaged lands by judgment creditor at sale on EXECUTION, 12,—**558.**
intention to contest, should be made known to other bidders: EXECUTION, 13,—**559.**
mortgagee's possession, when rightful: EJECTMENT, 2,—**107.**
ejectment against mortgagee in possession: EJECTMENT, 2,—**107.**
misdescription in, aided by possession: HOMESTEAD, 3,—**91.**
purchaser under, entitled to benefit of what COVENANTS, 2,—**325.**
redemption from, by purchaser, interest: EQUITY, 11,—**244.**

MUNICIPAL CORPORATIONS.

1. Where the common council is made the final judge as to the election of its members, the Supreme Court cannot review its decision on the facts. *Alter v. Simpson*, 138.
2. The charter of Detroit provides that resolutions of the common council shall be presented by the city clerk to the mayor for approval, and that if they are not approved or vetoed before the next meeting of the council they shall take effect without his signature. *Held*, that the mayor has the full period between the presentation of the resolution by the clerk and the next regular meeting thereafter, in which to act; and that his powers are not affected by the action of the clerk in withholding the resolution until a regular meeting has intervened. *Mayor of Detroit v. Moran*, 213.
3. The charter of Detroit invests the president of the common council with the powers of the mayor in case the latter is unable to perform his duties by reason of absence from the city. *Held*, that advantage cannot be taken of his temporary absence to approve a resolution of the council if he is not disabled from returning in time to act upon it himself before the next regular meeting. *Id.*
4. The city physicians of Grand Rapids are appointed and not elective officers, and are not authorized by the charter to hold over where their successors are not chosen within a fixed time after their terms expire and a vacancy occurs in the office. *Saunders v. Grand Rapids*, 467.
5. The city council of Grand Rapids is not precluded by the charter from filling an office held by their appointment where there is no one holding it for a regular term. *Id.*
6. Under the provision in the charter of Port Huron which empowers the common council to "issue new bonds for the refunding of bonds and evidences of indebtedness already issued," the common council may issue new bonds to raise money for the satisfaction of judgments. *Port Huron v. McCall*, 565.
7. Municipal powers are to be construed strictly; but the reason for strictness has little application when they are of a nature to concern no one but the people of the municipality; as for example, when they relate merely to a change in the form of municipal indebtedness. The question in such a case is, what was probably the legislative intent in granting a power. *Id.*

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8. If a city has obtained money on a particular construction of a power, and then adopts a different construction to avoid payment it is proper to give some weight to the first construction, if the question is one of doubt. *Id.*

approval of bond by council: LIQUOR LAW, 2,—**98.**

can sue before JUSTICE OF THE PEACE, 1,—**428.**

liable for injury from defect in HIGHWAYS, 2,—**555.**

liability for injury from defect in STREETS, 12–14,—**516.**

omission to sue officer by official title: PLEADING, 5,—**428.**

MUTUAL BENEFIT ASSOCIATION.

1. The rules of a regularly incorporated mutual benefit association provided that on the death of a member his share of the benficiary fund should be paid to the persons named by him on the will book, and that if he named no one it should be divided equally among his family. The rules did not assume to take away the right to change the disposition of the fund. *Held*, where a member made a will after entering an order on the will book, that the will should be followed. *Catholic Benefit Association v. Priest*, 429.
2. A beneficiary fund payable on the death of a member of an association to persons named by him, is not to be treated as part of his estate, subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries or to their guardians. *Id.*

NAME.

1. Kenney and Kinney are *idem sonans*. *Kinney v. Harrett*, 87.
2. The identity of a person sued on a transcript of a foreign judgment may be presumed if his full name is identical with that of the party against whom it was recovered. *Campbell v. Wallace*, 820.

idem sonans, Dixon for Dickson: MORTGAGE OF LAND, 18,—**107.**

NATIONAL BANKS

taxation of stock of: TAXATION, 9, 10,—**526, 527.**

NAVIGATION: see SHIPS AND SHIPPING.

NECESSARIES

debts for: DOMESTIC RELATIONS, 1; GUARDIAN, ETC., 8,—**321.**

NEGLIGENCE.

1. Where one of two innocent parties must suffer a loss occasioned by the negligence of one of them, it must rest on the one who caused it, however honest his intentions may have been. *Stebbins v. Walker*, 5.
2. No liability for negligence can be established on a stipulation of facts which states that the act complained of was due to mistake or negligence. *Gillett v. Detroit Board of Trade*, 309.
3. In an action for an injury caused by falling off the front rail of a street car, and being run over, the defendant's testimony, which was not contradicted, showed that the driver made every effort to rescue the plaintiff as he fell, and stopped his car as soon as he could. *Held*, that so far as running over him was concerned there was no question of negligence, on defendant's part, to go to the jury. *Downey v. Hendrie*, 498.
4. In an action against a railway company for the death of an engineer in consequence of a collision resulting from the yard-master's negligence in sending him out when a coming train was past due, it was *held* that as bearing upon the competency of the yard-master, questions as to the number of tracks in the depot yard—the number of engines ordinarily employed in switching—the average number of freight trains in the yard, and similar questions, were relevant as tending to show the character and importance of the work the yard-master had charge of, and the need of experience and skill. *Michigan Central R. R. Co. v. Gilbert*, 176.

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5. The nature of the business determines whether the degree of care exercised by those employed in it is such as the law requires. *Id.*
6. In a declaration for a railway injury, an averment that defendant negligently and carelessly drove a certain locomotive upon the railroad up to, upon and across a certain public highway at the crossing of the same and the said railroad, without giving the necessary statutory signals, viz.: ringing a bell or sounding a whistle, was a sufficiently specific averment of defendant's negligence when taken in connection with the averment of consequential injury, and it entitled plaintiff to support it by evidence, under defendant's plea to the general issue. *Chicago & Northeastern Ry. Co. v. Miller*, 532.
7. The neglect of a railroad company to ring a bell as required by statute when approaching a crossing will make it liable for any injury resulting from such neglect. *Id.*
8. An eight-year-old boy trespassing upon the premises of a railroad company got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started that moment and the tender passed over his leg. He was a boy of more than average intelligence and had been warned against going on the premises or riding on the engine. *Held*, that the railway company could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago & Northwestern Ry. Co. v. Smith*, 504.
9. An old man who was somewhat deaf, while driving a span of colts towards a railway track down a narrow road from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up, and tried to cross the track, and the rear of the buggy was struck by the locomotive. *Held*, that in an action for the resulting injury the question whether plaintiff was guilty of contributory negligence was for the jury. *Chicago & Northeastern Ry. Co. v. Miller*, 532.
10. It is contributory negligence for a passenger of ordinary common sense to sit on the driving bar of a street car even at the driver's invitation, if there is room for him inside the car. *Downey v. Hendrie*, 498.
11. Courts must take judicial notice of what everybody knows with regard to the incidents of railway travel. *Id.*

action against receiver of RAILROAD COMPANIES, 5,—**288.**
employment of servants: MASTER AND SERVANT, 1–5,—**176, 177.**
in repairing highway, township's liability: HIGHWAYS, 2,—**555.**
liability for collision: CARRIERS, 2, 3; SHIPS, ETC., 1–4,—**596.**
Limited Liability Act of Congress, application of: SHIPS, ETC., 4,—**596.**
of concealed principal, as an ESTOPPEL, 1,—**5.**
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of municipality, defect in STREETS, 12–14,—**516.**
of officer making levy: EQUITY, 10,—**224.**
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of appointment of commissioners: DRAINS, ETC., 1,—**138.**
of execution sale, delay in: EXECUTION, 9,—**19.**
of intention to contest mortgage, to bidders at sale on EXECUTION, 13,—**559.**
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of sale, affidavit of publication: MORTGAGE OF LAND, 19,—**418**
of statutory foreclosure: MORTGAGE OF LAND, 17, 18,—**107**
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to owner of impounded ANIMALS, **5**,—**460.**
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to quit, effect of repetition of: LANDLORD, ETC., 2—**74.**
NOVATION.
question of: STATUTE OF FRAUDS, 4,—**103.**

NUISANCE.

1. Judgment for the abatement of a nuisance should not be rendered unless there is a specific finding of a present state of things showing its necessity. And an information which does not allege that it is a continuing nuisance will not support such a judgment. *Messersmidt v. People*, 437.
2. Where an information for nuisance alleges that it arises from the use of things innocent in themselves, the case does not call for their destruction in order to effect an abatement, but for the discontinuance of the objectionable method of using them. *Id.*
3. Where a common nuisance is alleged by a criminal charge, facts enough to support the allegation must be stated. *Id.*
4. A charge that defendant polluted an ancient stream, thereby rendering the water unfit to drink "to the common nuisance of the people," must show that the stream is one in which the public has rights. *Id.*
5. *Quære* whether there can be any legal ground for complaint for the pollution of subterranean waters when it is caused by a proper use, without negligence, of adjacent premises. *Upjohn v. Richland Board of Health*, 542.
6. If there can be any such ground of complaint it can only be when the injury is of a very positive and substantial character. *Id.*

injunction of location of CEMETERY, 1-4,—**542.**

OBSTRUCTION
of ditch: DRAINS, ETC., 2,—**469.**
OFFER.
acceptance of, to constitute CONTRACT, 1-4,—**610.**

OFFICER: *Qualification*, 1; *changing salaries*, 2-5.

1. It cannot be presumed that a *de facto* official has neglected to make any necessary qualification. *First National Bank of St. Joseph v. St. Joseph*, 526.
2. Comp. L. § 535, empowered boards of supervisors to fix the compensation of the prosecuting attorney from time to time. Act 154 of 1879 provided that annual salaries should be fixed by the board on or before the 31st of October, before the officers' terms began, and should not be changed during the term. *Held*, that this would not prevent a board which had fixed a salary before Act 154 was passed, from changing it for the second year of the prosecuting

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attorney's term. Such a construction does not make the act retrospective. *Knappen v. Barry County Supervisors*, 22.
8. The act of a board of supervisors in fixing the salary of a prosecuting attorney does not constitute a contract between the latter and the county; and where the Constitution does not prevent, the Legislature can authorize the board to change the salary so far as it has not already been earned, even though a part of the official duties are duties to the State. *Id.*
4. Acceptance of a salaried public office does not establish contract relations between the officer and the public whereby the latter are bound to continue to pay the same salary as was paid at the time of the appointment to office. *Wyandotte v. Drennan*, 478.
5. The Legislature has ample power to fix the salaries of public officers, and, unless restrained by the Constitution, to change them at any time, even during the official term, and it can delegate this power to municipal councils. *Id.*

acknowledging, testimony as to donor's competency: GIFT, 5,—**167.**
action of majority of board: STREETS, 8,—**151.**
disqualification of member of board, by interest: SCHOOLS, ETC., 3,—**127.**
negligence in making levy: EQUITY, 10,—**244.**
no presumption against correctness of action: TAXATION, 8,—**150.**
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to suit to enjoin paving assessment: STREETS, 9,—**120.**

PARTITION
effect on interest of TENANTS IN COMMON, 1, 2,—**389.**

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PARTNERSHIP.
1. Where several persons put up a building as partners, and one of them buys brick for the purpose without an express understanding with the vendor that it is an individual purchase, and the brick is actually used in the building, the partners are liable as such for its value. *Stecker v. Smith*, 14.
2. In an action against several defendants impleaded as partners, the plaintiff is entitled to lay all the facts before the jury and have their opinion as to whether the transaction was not that of a partnership, or did not, at least, entitle plaintiff to charge defendants as partners. *Id.*
3. Plaintiffs sued as partners, and a witness on their behalf testified to admissions by defendants sufficient to make out their liability. The witness said nothing respecting the partnership of the plaintiffs, and was not cross-examined as to his knowledge of them. Defendants put in no evidence. *Held*, that a judgment for plaintiffs on this evidence should not be disturbed. *Wattles v. Moss*, 52.
4. Where a partner had turned over to the firm certain securities to be used in paying for property purchased by them, and the firm credited him with them and guaranteed them to the party to whom they were given, and when a deficiency afterwards arose the partner who had been credited took back the title to a part of the mortgaged premises, it was to that extent proper to charge back the securities to him. *Harrison v. Dewey*, 173.
5. A fair compromise deliberately made by partners in settling their accounts ought not to be disturbed on a bill for an accounting, if the parties had had full opportunity to inform themselves and complainant does not show that there were false charges or omissions of specific credits. *Id.*

offer by one partner to sell out, acceptance: CONTRACT, 4,—**610.**
transcripts from books, on accounting: APPEAL, 6,—**173.**
PASSENGER
right of action for negligent collision: CARRIERS, 2, 3; SHIPS, ETC., 2, 3,—**596.**
PAVING: see STREETS.
PAYMENT.
1. The giving of a note and mortgage for a previous debt do not, as matter of law, discharge the debt unless it is so agreed or understood. *Brown v. Dunckel*, 29.
2. But where the evidences of the previous debt are surrendered when new securieties are taken, this is *prima facie* evidence of satisfaction, but not conclusive. *Id.*

application of rental on mortgage debt, MORTGAGE OF LAND, 12, —**539.**
application upon agent's debts: ESTOPPEL, 1,—**5.**
contribution from surety: SURETYSHIP, 4,—**328.**
estoppel from enforcing: BILLS AND NOTES, 2,—**1.**
evidence of satisfaction, PAYMENT, 1, 2,—**30.**
for oral promise to devise, recovery back: WILL, 1,—**62.**
guaranty of: GUARANTY, 1-4,—**70.**
of demands against ESTATES, ETC., 4,—**33.**
of orders, when no ESTOPPEL, 3,—**239.**
of taxes by mortgagee: MORTGAGE OF LAND, 13, 14,—**252, 253.**
promise to pay another's debt: STATUTE OF FRAUDS, 4,—**103.**
satisfaction of one mortgage by giving another: MORTGAGE OF CHATTELS, 7,—**29.**
PERSONAL DECREE
collection of deficiency restrained: MORTGAGE OF LAND, 25,—**301.**
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creditor's right to rely on: LIEN, 1,—**6.**

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PERSONAL PROPERTY
purchaser runs risk of the title: SALE, 4,—**485.**
PHYSICIAN AND SURGEON.
1. Where a physician takes an unprofessional unmarried man with him to attend a case of confinement, and no real necessity exists for the latter's assistance, both are liable in damages; and it makes no difference that the patient or husband supposed at the time that the intruder was a medical man and therefore submitted without objection to his presence. *DeMay v. Roberts*, 160.
2. A physician took an unprofessional friend with him to attend a case of confinement when there was no emergency requiring the latter's presence. The physician told the patient's husband that he had brought a friend with him to help him carry his things, and he was accordingly admitted. The patient on afterwards discovering the facts sued both in damages. *Held*, that the plaintiff and her husband had a right to assume that the outsider was a medical associate; that in obtaining admission without disclosing his true character, the defendants were guilty of deceit; that plaintiff had a right to testify that she had supposed he was a physician or medical student, and also to give evidence of whatever may have been said at the time tending to support such supposition. It was also admissible to ask a competent witness as to the custom among physicians in regard to calling assistance in these cases. *Id.*
3. A physician has no right to publish matters of professional confidence without the approbation of the person concerned; it is a breach of professional duty deserving censure. *Sullings v. Shakespeare*, 408.
appointment of city physicians: MUNICIPAL CORPORATIONS, 4,—**467.**
evidence as to medical standing of: LIBEL, 11,—**409.**
PLAT
incorrect reference to, in deed: DEED, 1, 2,—**83.**
omission to acknowledge: REAL PROPERTY, 8,—**605.**
apportionment of deficiencies between lots: REAL PROPERTY, 9, 10,—**605.**
PLEADING.
1. Where a declaration in justice's court is good in substance, and defendant is present and pleads to the merits, he waives any objection on the ground of its being too general. *Whelpley v. Nash*, 25.
2. A declaration in case before a justice for overflowing defendant's land, sufficiently sets forth the cause of action in alleging that defendant dammed, or caused to be dammed, a ditch which plaintiff had used as a matter of right for more than twenty years, and was situated on a road laid out by the commissioners of highways, and that by the obstruction of the ditch the plaintiff had suffered damage as specified. *Enright v. Hartsig*, 469.
3. A declaration in case for false warranty may be sustained without allegations that defendant "falsely and fraudulently warranted" and "falsely and fraudulently deceived" the plaintiff, if the substantial averments show the false warranty and the fraudulent sale, and deception of the purchaser. *Hopkins v. O'Neil*, 408.
4. A demurrer on technical grounds does not affect the sufficiency of a declaration in matters of substance. *Enright v. Hartsig*, 469.
5. Omission to sue a municipal officer by his official title is not a substantial objection if his liability is shown. *Hart v. Port Huron*, 428.
6. A declaration setting up a joint obligation will not sustain recovery unless a joint debt is proven, and failure to prove the claim as

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against one defendant is as fatal as not to prove it against any. *Munn v. Haynes*, 140.
7. The right of pleading in abatement is an absolute and valuable right. *Id.*
8. Suit cannot be brought against an individual party to a joint contract, and judgment taken upon it, without giving the defendant an opportunity to plead non-joinder in abatement. *Id.*
objection to be taken by demurrer: EJECTMENT, 6,—**87.**
plea of guilty, examination by judge: CRIM. LAW, 20,—**222.**
plea of STATUTE OF LIMITATIONS, 1,—**337.**
POLICE POWER.
dog-tax an exercise of: ANIMALS, 2, 3,—**183.**
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power to issue refunding bonds: MUNICIPAL CORPORATIONS, 6,—**565.**
POSSESSION.
aiding misdescription in mortgage: HOMESTEAD, 3,—**91.**
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necessary to bill to clear title: EQUITY, 15,—**51.**
of sheriff, on ATTACHMENT, 3, 4,—**249.**
of TENANTS IN COMMON, 1,—**389.**
ouster by act of ownership: REAL PROPERTY, 2,—**330.**
summary proceedings, see FORCIBLE ENTRY, ETC.
taking, as part performance: SPECIFIC PERFORMANCE, 2,—**112.**
POWER OF SALE.
effect on, of release of parcel: MORTGAGE OF LAND, 20,—**312.**
PRACTICE: *In the circuit courts—service of declaration*, 1–3; *objections to process*, 4; *discontinuance against joint promisor*, 5, 6; *in Supreme Court—absence of documents*, 7, 8; *damages for delay*, 9; *what matters reviewed, and how*, 10–28; *decision on the merits*, 29; *objections to evidence*, 30.
1. Service of a declaration beyond the jurisdiction may be made by private persons. *Munn v. Haynes*, 140.
2. Where service on defendants within the jurisdiction must be proved before service is made on a joint defendant outside of it, but is not shown by the return, an amended return not filed until after all have been served, but showing that service was made on resident defendants first, is not important. *Id.*
3. Service on a joint defendant beyond the jurisdiction was held valid where the return showed that service on the other defendants was made earlier and that the service beyond the jurisdiction was made on the date of the return. *Id.*
4. One who joins issue, and goes to hearing on the merits, is generally understood to waive objections to the process which he does not distinctly make known. *Maxwell v. Deens*, 35.
5. Discontinuance as against a party charged as a joint promisor discharges a co-defendant against whom judgment has been taken by default, because it leaves the case resting on the allegation of a different contract from that on which judgment was taken. *Munn v. Haynes*, 140.
6. A discontinuance as against a joint promisor is allowable only where he was incompetent to contract, or has been discharged by bankruptcy or the statute of limitations or something that has not discharged his co-defendants. *Id.*
7. When the determination of the legality of paving assessments depends on documents, the court will not pass upon it without full proof of the documents themselves. It will not accept the inferences and conclusions of parties or counsel, but will construe them for itself. Am. Ins. Co. v. Reed, 40 Mich. 622, followed. *Wilkins v. Detroit*, 120

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8. Where a cause was heard on pleadings and stipulations which did not set out in terms documents necessary to be considered, the decree was vacated and the cause remanded for such further proceedings as should remedy the deficiencies. *Id.*
9. Costs were awarded defendant in error by way of damages for the delay caused him by taking the case up on frivolous assignments of error. *Schmemann v. Rothfuss*, 453.
10. A stipulation of facts for purposes of judgment must be treated as a special verdict, and if it does not unequivocally show a liability the case must fail, as the burden of proof is on the plaintiff. *Gillett v. Det. Board of Trade*, 309.
11. The Supreme Court has no power to review law cases upon the facts; its jurisdiction is limited to reviewing rulings of the trial court on such questions of law as were distinctly presented and passed upon. *Chatterton v. Parrott*, 432.
12. A general exception to a judgment cannot entitle one to raise any question of law that could have been raised in the court below *Id.*
13. A mere exception to a judgment that is good in form can never be available to raise any question in the Supreme Court. *Id.*
14. Where findings are made, an exception that they do not support the judgment can be considered in the appellate court. *Id.*
15. A mere recital showing the facts of a case at law, the nature of the judgment and the fact that a party excepted to it presents no question for the Supreme Court, if there are no findings and the judgment is good in form. *Id.*
16. A court's conclusion of fact in favor of the validity of a judgment introduced in evidence, cannot be reviewed if there are no facts or exceptions which would raise a doubt on the subject. *Tharp v. Allen*, 389.
17. Judgment cannot be rendered on an alleged state of facts which has not been found, nor be given for damages if there is no finding of damage set forth in the record. *Wiley v. Lovely*, 83.
18. Where findings in favor of the plaintiff on all points presented could not have established his right to a judgment, the case cannot be treated as one of mistrial for refusal to find on some of them. *Id.*
19. The Supreme Court cannot in a case at law proceed to ascertain and assess the damages involved, no matter how well established may be their measure. *Id.*
20. No question for review arises upon a record brought up as a case made and containing only a statement of the facts found by the court, and the judgment thereon. *Hedges v. Hibbard*, 551.
21. No exception can be taken to a judgment upon a general finding of facts made by the court, where no special findings were asked for or made. *Id.*
22. Mere deductions from the evidence, made after judgment as a basis for review, are not part of the record and can not be brought up on error. *Id.*
23. The Supreme Court has no power to review the findings of a jury, on a writ of error, since, if there is testimony enough to go to the jury that body must find the facts for itself. *Tyler v. Smith*, 292.
24. The Supreme Court cannot on error pass upon a question of fact not submitted to the jury, and not admitted by the opposite party. *Castner v. Farmers' Ins. Co.*, 15.
25. The Supreme Court cannot consider the weight of testimony. *Kent Furniture Mfg. Co. v. Ransom*, 416.
26. The Supreme Court has no right to weigh evidence in law cases. *Rider v. Kern*, 455.
27. The Supreme Court does not weigh testimony in law cases, or judge of its truth. *Hicks v. Lyle*, 488.

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28. Where evidence tends to make out a case for the plaintiff, its force and effect is for the jury, and the Supreme Court will not attempt to review or weigh it. *Cuddy v. Horn*, 596.
29. Where both parties desire, and the public interest demands, that a court pass upon the merits of a case, and preliminary objections do not go to the jurisdiction, the main case may be disposed of. *L. Shore & Mich. S. Ry. Co. v. People*, 193.
30. The objection that the evidence introduced in support of a claim is not the best evidence cannot be raised for the first time in the Supreme Court. *Hart v. Port Huron*, 428.

commissioners of deeds not to take DEPOSITION, 1,—**52.**
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objections to juror's competency: TRIAL, 5,—**432.**
on execution for deficiency on foreclosure: MORTGAGE OF LAND, 26-31,—**489, 490.**
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none, of improper record: MORTGAGE OF LAND, 9,—**521.**
none, that temporary secretary was not sworn: CORPORATIONS, 3,—**526.**
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of identity of person from identity of NAME, 2,—**320.**
of servant's unfitness: MASTER AND SERVANT, 2,—**176.**
that buildings go with the land: REAL PROPERTY, 1,—**389.**
that mortgager owns the fee: MORTGAGE OF LAND, 22,—**418.**
that officer has qualified: OFFICER, 1,—**526.**
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that return is correct: CERTIORARI, 6,—**414.**

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PRINCIPAL AND SURETY: see SURETYSHIP.

PRIORITY OF RECORD
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force and effect of evidence: PRACTICE, 28,—**596.**
joint liability for negligent collision: SHIPS, ETC., 3,—**596.**
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whether article is really libelous: LIBEL, 10,—**409.**
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against indefinite claim: EQUITY, 16,—**324.**
against tax sale to the State: TAXATION, 18,—**256.**
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RAILROAD COMPANIES: *Taking land for*, 1; *consolidation*, 2; *conduct in railway stations*, 3, 4; *action against receiver for injury*, 5; *obligation to forward cars*, 6; *railway management*, 7.
1. Jurisdiction to appoint commissioners of appraisal in proceedings to condemn land cannot be conferred by notice served only on a person who is in no way connected with the owner of the premises and has only gone on them to receive service by collusion with those interested in the condemnation. *Dunlap v. Toledo A. A. & G. T. Ry. Co.*, 190.
2. The general railroad law, in permitting the consolidation of railroad companies within the State with others beyond its boundaries, contemplates leaving the domestic company in its original position as to stock and loans, and annexing to its capital and loans those additions which are made proportional to the original amounts. *Lake Shore & Mich. S. Ry. Co. v. People*, 193.
3. Railway passengers are entitled to remain in the waiting room at a station as long as they have occasion to do so, and commit no offense against the good order of the place and reasonable regulations made to govern it; they are not bound to leave it on being ordered out by the keeper for any such indecorum as spitting on the floor, and the refusal to go on being ordered will not excuse the commission of an assault and battery upon them to compel them to. *People v. McKay*, 439.
4. A railway station keeper assaulted a passenger for not leaving the waiting room when ordered, the passenger having enraged him by

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spitting on the floor. *Held*, that in defending an action for the assault and battery a question as to the plaintiff's smoking was irrelevant, where his smoking had not been objected to. *Id.*

5. Whether an action for a railway injury lies against the receiver of the company in whose employment it was incurred—Q. *Smith v. Flint & Pere Marquette Rw.*, 258.
6. The statutory requirement that every railroad shall impartially and diligently receive and forward the cars of other roads does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Id.*
7. The court will take notice as part of the general knowledge of the business community that the railroads of the country conduct inspections under a system which all persons so employed as to be interested are presumed to understand. *Id.*

accident to passenger in street car: NEGLIGENCE, 3, 10,—**498.**
condemning lands, review by CERTIORARI, 2,—**190.**
judicial notice of incidents of railway travel: NEGLIGENCE, 11—**498.**
injury from negligence of fellow employee: MASTER, ETC., 6-8,—**258. 259.**
injury to trespasser on railway premises: NEGLIGENCE, 8,—**504.**
injury to employee: NEGLIGENCE, 4,—**176.**
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injury to traveler on highway: NEGLIGENCE, 9,—**532.**
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power of State to authorize consolidation: CORPORATIONS, 1,—**224.**
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who are fellow employees: MASTER, ETC., 6, 7,—**258, 259.**

REAL PROPERTY: *What passes with*, 1; *possession*, 2, 3; *title*, 4-8; *acknowledgment of plat*, 8; *apportionment of deficiencies between lots*, 9, 10.

1. Buildings are presumed to go with the land in the absence of proof to the contrary. *Tharp v. Allen*, 389.
2. The holder of a legal title is not ousted by the act of a contract purchaser in going on the land with a team and plowing for a few hours. *Goetchius v. Sanborn*, 330.
3. A son who goes upon his father's land with the father's consent, and occupies a building already there, but who takes and holds possession under no claim of enjoyment that would create a homestead interest, and after his father's death pays rent to the representative of the estate, is merely a lessee, so far as his exclusive possession is concerned. *Tharp v. Allen*, 389.
4. Title to land cannot pass by a mere estoppel shown by parol; neither can an apparent title be assailed by the parol evidence of one who has caused its transfer. *First Nat. Bk. of Kalamazoo v. McAllister*, 397.
5. The presumption in favor of one who holds the earliest recorded title, cannot be destroyed without proof of an earlier right based on superior equities. *Id.*
6. An interest that rests in parol may be extinguished by parol. *Id.*
7. A purchaser of land was in debt to his wife to an amount exceeding the purchase money, and as she desired security, he returned his deed to the grantor and had another executed directly to her. She afterward wished to buy the land outright, and gave up to her husband the evidences of his debt. *Held*, that as between them the transaction could be upheld as a sale; the cancelling of the debt was a complete payment of consideration. *Id.*
8. Where both parties to a suit respecting lands trace title through conveyances made with reference to a recorded plat, it is immaterial

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that the plat was never properly acknowledged. *Quinnin v. Reimers*, 605.

9. Where in platting a village it turns out that by mistake the blocks are not so long as the plat represents, the deficiency must be apportioned between the lots of the block according to their apparent size as shown by the map. *Id.*

10. And this rule will be applied notwithstanding the explanations upon the plat state that all lots are of full size except those made fractional by a named street; it appearing that according to the plat such street made certain lots fractional, and such last-mentioned lots evidently being all the explanations intended to except. *Id.*

accounting for rents and profits: EQUITY, 2-4, 6,—**587.**
conveyances made by intestate: ESTATES, ETC., 4,—**33.**
creditors' levy on previously conveyed land: EXECUTION, 4,—**398.**
description of, in contract for sale: STATUTE OF FRAUDS, 2, 3,—**610.**
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oral promise to devise: WILL, 1,—**62.**
possession necessary to bill to clear title: EQUITY, 15,—**51.**
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presumption in favor of prior record: REAL PROPERTY, 5,—**398.**
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municipal power to issue: MUNICIPAL CORPORATIONS, 6-8,—**565.**

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of parcel, effect on power of sale: MORTGAGE OF LAND, 20,—**312.**
when necessitates sale in parcels: MORTGAGE OF LAND, 21,—**313.**

RELIGIOUS SOCIETIES.

1. A bishop is not liable for the salary of a priest whom he has engaged; they are fellow servants of the church for which the bishop acts merely as a superior agent, and not as a principal. *Rose v. Vertin*, 457.

REMOVAL
of causes, from State court: COURTS, 2, 3,—**189.**
of school director by town board: SCHOOLS, ETC., 2-6,—**127, 316, 317.**

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of statute: STATUTES, 2,—**74.**
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of newspaper libel, how shown: LIBEL, 7,—**408.**
REPLEVIN.
1. The value of property is not in issue in a replevin suit therefor except for the purposes of an assessment of value in defendant's favor. *Eldred v. Woolaver*, 241.
2. In suing out a writ of replevin for property for which plaintiff had recently paid more than $100 and which defendant had taken from his possession without his consent, the plaintiff may properly regard his cause of action as within the jurisdiction of the circuit court. *Id.*
bond in, secures costs on *certiorari:* COSTS, 4,—**12.**
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for railroad, proceedings to obtain: RAILROAD CAMPANIES, 1,—**190.**
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RIPARIAN PROPRIETORS.
1. The State cannot interfere with a riparian's profitable enjoyment of the shore without compensating him. *Maxwell v. Bay City Bridge Co.*, 278.
injury from proximity of BRIDGES, 2-4,—**278.**
RULES.
Circuit Court Rule 51: Objections to deposition, 95.
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SALARY
of priest, bishop not liable for: RELIGIOUS SOCIETIES, 1,—**457.**
of public officer, power to change: OFFICER, 2-5,—**478.**
SALE.
1. A contract for a machine, if it is "satisfactory or does what is claimed for it," is binding if the machine meets the warranty, whether the purchaser is satisfied or not. *Clark v. Rice*, 308.
2. An extension of time, in a proposal to sell, stands by itself, and is not the same as the contract of sale, which is completed only by an acceptance of the proposal. *Eggleston v. Wagner*, 610.
3. Mortgaging goods held under a contract of purchase, before fulfilling the obligations of the contract, is an assumption of owner-

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ship, and the intent with which it is done is immaterial so far as concerns the vendor's right to reclaim them. *Winchester v. King*, 102.
4. The purchaser of personalty runs the risk of the title, and if he buys from one who cannot give title he must suffer the loss and look to his vendor. *Tuttle v. White*, 485.

as evidence of value: EVIDENCE, 1,—**42.**
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conveyance to wife to cancel debt: REAL PROPERTY, 7,—**398.**
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guaranty of payment: GUARANTY, 1-4,—**70.**
of entirety of mortgaged property: EXECUTION, 10,—**19.**
of real estate on EXECUTION, 11,—**332.**
of mortgaged premises, under power: MORTGAGE OF LAND, 20, 21,—**312, 313.**
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for taxes: see TAXATION, 18, 19.
on execution: see EXECUTION, 8-13.
on foreclosure: see MORTGAGE OF LAND, 17-21.

SCHOOLS AND SCHOOL DISTRICTS.

1. Comp. L. § 3618 in providing that the township school director shall keep the necessary school-house furniture in due order and condition, and that his expenses shall be subsequently audited and paid, does not intend that money must be put into his hands beforehand. *Hamtramck v. Holihan*, 127.
2. The wilful refusal of a school director to sign a contract made with a teacher, or to accept and file it, or draw orders for the teacher's pay while it is pending, and his obstinate neglect to furnish necessary school-house supplies, may be taken into account in proceedings for his removal. *Geddes v. Thomastown*, 316.
3. Proceedings to remove a school director for refusing to recognize the validity of a teaching contract were taken by a township board one of the members of which was related to a third person who had a contract subject to the same objections. *Held*, that this did not legally disqualify the member from acting on the case actually before the board. *Hamtramck v. Holihan*, 127.
4. Proceedings by a township board to remove a school director cannot properly be taken until the action of the proper authorities has been invoked by complaint of some definite violation of duty. (Comp. Laws § 3695); but where the plaintiff admits the charges set up against him and expressly desires the board to act on them without farther delay, he cannot afterwards complain that they did so. *Geddes v. Thomastown*, 316.
5. The township board is exclusive judge of the facts on which it is authorized by Comp. L. § 3695 to remove a school director, and its proceedings can only be reviewed by the circuit and Supreme courts on questions of law. *Hamtramck v. Holihan*, 127.
6. The action of a town board in removing a school director is final unless speedily brought up for review. *Geddes v. Thomastown*, 316.

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1. The master of a vessel cannot relieve himself of responsibility for its safe management by surrendering its control to a charterer. *Cuddy v. Horn*, 596.
2. Passengers on a steam yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its owners for injuries caused them by the negligent management of those in charge of it. *Id.*
3. If a passenger upon one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly, and it is for the jury to fix the liability where it belongs. *Id.*
4. The Limited Liability Act of Congress exempting ship-owners from personal liability for injuries caused by the negligence of those in charge of their vessels, does not apply to boats navigating streams connecting the Great Lakes. *Id.*
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SPECIFIC PERFORMANCE.
1. A son agreed with his father to remove with his family to the latter's house, take care of the father and turn over to him annually a certain proportion of the crops, in consideration of all which the father was to deed to the son a certain parcel of land, which he promised to do, but did not. The only uncertainty related to the time at which the deed was to be given. *Held*, that the case was sufficient to sustain a bill for specific performance against the administrator and heirs at law of the father. *Lamb v. Hinman*, 112.
2. The reason why taking possession of land under an oral contract is such part performance of the contract as will sustain a bill for its specific performance, when payment of the purchase price is not, is that in the former case there is no certain basis for estimating damages for the breach. *Id.*

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3. A party to a contract after being grossly in default has no absolute right to its enforcement. *Russell v. Nester*, 290.
4. The vendor of land, after warning the purchaser, who was grossly in default, sold the premises to others who knew the facts but purchased in good faith, paying a sum which would not exceed the amount remaining due from the former purchaser and which was all that could have been obtained if they had been sold on foreclosure. The former purchaser did not warn the later ones against proceeding to use the lands. *Held*, that a decree for specific performance of the first contract, on a bill against the vendor and the later purchaser, was not equitable. *Id.*
5. A decree for the specific performance of a land contract cannot relate back to the date of filing the bill for the purpose of bringing trespass against the lessee of a defendant who holds the legal title and actual possession. *Goetchius v. Sanborn*, 330.
6. An action at law does not lie for damages resulting from the neglect to obey a decree requiring the specific performance of a contract, where the decree itself was unwarranted, as where it has been changed on an *ex parte* application and without notice to the defendant. *Berry v. Innes*, 518.

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STATUTE OF FRAUDS.
1. A town treasurer sold a pump on a tax levy and the purchaser sold it to third parties who claim that the treasurer promised verbally, and without receiving any consideration, to be responsible for the title. *Held*, that the promise was a collateral undertaking involving no liability until the failure of the latter contract, under which a warranty of title was implied by rules of law. *In re Estate of Tozer*, 299.
2. The description of real property, in a contract for its sale, must so fit and comprehend it that it can be applied to the property intended and exclude all else with the aid at least of extrinsic testimony which shall neither contradict nor add to it; and a conflict in the extrinsic evidence cannot establish its insufficiency under the Statute of Frauds. *Eggleston v. Wagner*, 610.
3 The sufficiency, under the Statute of Frauds, of a description of land in a contract for its sale, is a question which arises on the face of the papers, and, *it seems*, should be settled by inspection thereof before the introduction of extrinsic evidence to connect the contract with any particular premises. *Id.*
4. A firm of lumber dealers made a contract with a firm of manufacturers whereby the latter were to convert the timber on certain premises into shingles and siding. The manufacturers made an independent contract with a logger to cut the timber and haul it to the mill, but as they were slow in making payment, the logger went to the dealers for payment and they verbally agreed to pay him on orders from the manufacturers. Several payments were made in this way, but when the logger tried to obtain a final settlement they refused to pay him the balance, and he brought suit on the agreement. *Held*, that it could not be maintained. There was no novation except so far as the orders were actually given; and the verbal agreement was a promise to pay another's debt, and, under the Statute of Frauds, could not be enforced. *Preston v. Young*, 103.

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1. The right to deal with a public improvement as a whole, in assessing property affected by it, is determined by its unity and not simply by the fact that the street through which it extends is called at different points by different names. And a resolution declaring the necessity of grading a particular street may properly include branches thereof surrounding a space which lies across the way but really constituting a part of the thoroughfare. *Cuming v. Grand Rapids*, 150.
2. Error in the exercise of an undisputed power to levy an assessment cannot be presumed from ambiguous facts. *Id.*
3. A resolution of a common council declaring the necessity of a street improvement, is not invalidated by including "the necessary bridges, culverts," etc., without specifying what was necessary, especially if it does not appear that anything was necessary beyond the improvement of the street; the resolution does not delegate authority to decide upon the necessity, as details may afterwards be settled by the council. *Id.*
4. A charter provision that the Board of Public Works shall estimate the cost of a proposed public improvement and report it to the common council before an assessment is made therefor is sufficiently observed if the board adopts, approves and reports to the council an estimate made by the city surveyor. *Id.*
5. A bill to enjoin the collection of a street tax because the estimate of its cost, as submitted to the council, was in gross, should clearly negative the submission also of information in detail. *Id.*
6. Whether an assessment for a public improvement is invalid because the estimate of its cost was submitted in gross and not in detail, and whether, if the estimate was adopted, any question can afterwards be raised—Q. *Id.*
7. The cost of engineering and printing are legitimate expenses incl-

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dent to a public improvement, and are properly included in the assessment therefor. *Id.*

8. The action of a majority of a city board of equalization and review in making an assessment for the improvement of a street, is legal if all members of the board were notified of the meeting at which it was taken. Comp. Laws § 2. *Id.*
9. Under the paving system followed in Detroit, the contractor is not an indispensable party to a suit against the city to enjoin the enforcement of an assessment. *Wilkins v. Detroit*, 120.
10. The city of Detroit has authority to repave streets at the expense of adjacent property, when there is a necessity for repaving, and the method of procedure is the same as in other paving. No contract for paving can be made until the common council has referred the matter to the Board of Public Works, and received from that board the reports and information provided for in the Public Works Act, as decided in Butler v. Detroit 43 Mich. 553. But an assessment will not be held void when this has been done substantially in accordance with the purposes of that act. *Id.*
11. Notices to bidders must contain the substantial requisites of specifications, so that bidders can from such notices obtain the information necessary to enable them to prepare their bids. *Id.*
12. A city under the statute of 1879, (Gen. Laws, p. 223), is liable to a party who is injured by reason of a defect in one of its streets along which he is passing. *Grand Rapids v. Wyman*, 516.
13. In an action for such an injury it is not proper evidence on the part of the defense that persons living in the immediate vicinity had not noticed the defect, which had existed several days. *Id.*
14. The plaintiff was permitted to show, as bearing on the question of municipal negligence, that similar defects had often been suffered to continue for a considerable time without attention. *Held*, no error. *Id.*

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SURETYSHIP.

1. A surety only engages to make good a deficiency; and an arrangement between his principal and the creditor, without his privity, whereby the principal is not to be sued by the creditor, is a substantial alteration of the contract of suretyship to the surety's prejudice. *Farnsworth v. Coots*, 117.
2. In an action brought by the obligee in an indemnity bond against the surety, there was evidence tending to show that the principal and the obligee had agreed, without the surety's knowledge, that the principal should not be sued on the bond, but that suit should be brought, in the interest of the principal, against the surety. The defendant offered for submission to the jury special questions as to whether the suit was not brought for the benefit of the principal, and not for that of the obligee, and whether a check given by the principal to the obligee's attorney, but not used, had not been given on the understanding that the principal should not be sued on the bond. The court refused to submit the questions and did not cover them in his charge. *Held*, that the refusal was erroneous. *Id.*

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3. On appeal from probate proceedings for the settlement of a guardian's account the sureties on the appeal bond cannot be included in the judgment. *Bondie v. Bourassa*, 321.
4. Where an appeal bond names certain persons as sureties, it must be assumed that each one contemplates that the rest will join in its execution; and one who sues on the bond has the burden of explaining the omission of any one to do so. And if any surety denies its execution on oath and testifies that his supposed signature is a forgery, and the justification of the sureties a fraud, the plaintiff is under stronger obligation to show that defendant signed and delivered the bond with full knowledge of the facts. *Woodin v. Durfee*, 424.
5. B. and G. gave a joint note to C., G. signing as B.'s surety. C. indorsed it to P. who afterwards released it, taking instead a joint note given by G. with C. as surety. *Held*, that on the original note G. was the debtor of C. and would have had recourse only to B., and that on paying the second note he could not claim contribution from C. who was virtually his surety in both cases. *Goetchius v. Calkins*, 328.

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1. Taxes, as contemplated by article xiv of the Constitution, are burdens, charges or impositions for *public* uses, and not mere regulative expedients to repress private mischief and redress private injuries. *Van Horn v. People*, 183.
2. An objection to the valuation of property as set down on a township tax-roll, on the ground that the figures indicating the amount are wrongly divided by a red line so that it is uncertain what it is, in dollars and cents, is not well taken where it is plain that no attention had been paid to the line, and that the amounts of taxes were all properly carried out between the right lines. *First Nat. Bk. of St. Joseph v. St. Joseph*, 526.
3. If a tax-payer does not have the assessment of his property corrected and perfected when it is in his power to do so, he must be assumed to admit its correctness. *Id.*
4. A tax assessor cannot be presumed to have personal knowledge of the private affairs of persons assessed unless they choose to furnish it; as, of the amount of debts due by the holder of bank stock subject to taxation. *Id.*
5. Where the objection to a tax assessment is that it should not be for an aliquot part of a general charge, but for the separate benefit which the premises receive, the owners of different parcels have conflicting interests and it is doubtful whether they can join in a bill to enjoin the assessment. *Brunner v. Bay City*, 236.
6. An extension of time granted by a township board for the collection of taxes is not invalidated by the fact that in the absence of the township clerk, a justice of the peace, summoned to act as a member of the board, was appointed to act as Secretary. *First Nat. Bk. of St. Joseph v. St. Joseph*, 526.
7. A warrant for the collection of taxes is not fatally defective for being addressed to the treasurer of the township of ———, if it is properly signed by a supervisor of a specified township, and is annexed to its tax-roll. *Id.*

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8. A bill in equity to restrain the collection of a tax cannot be aided by any presumption against the correctness of official action. *Cuming v. Grand Rapids*, 150.
9. The power of the state to tax national bank stock is derived entirely from the Act of Congress permitting it, and the requirement of the act must be obeyed in good faith. The State tax law is to be construed in connection with the act, in assessing stock. *First Nat. Bk. of St. Joseph v. St. Joseph*, 526.
10. The Michigan tax law enumerates as taxable property all credits in excess of the debts of the persons taxed. Comp. Laws § 969. *Held*, that it is not necessarily in conflict with the provision of the Act of Congress that national bank stock shall not be taxed at a greater rate than other moneyed capital in the hands of individuals (Rev. St. U. S. § 5219), even though the latter are taxed for the full value of their bank stock without deducting their indebtedness. *Id.*
11. Where a statute requires a corporation to be taxed at a certain rate upon its capital and on loans employed in the State, and the Auditor General merely computes the amount of the tax on the basis of reports made to him by the company, but without passing judgment upon their correctness, the State is not precluded from enforcing payment of the correct amount. *Lake Shore & Mich. S. Ry. Co. v. People*, 193.
12. A railway company is taxed, not for the face of the bonds upon which it negotiates a loan, but for the amount of the loan. *Id.*
13. Stock dividends and issues of stock proportioned to that previously held by shareholders, must stand on the same footing with original stock and should be taxed as far as it is considered paid in. *Id.*
14. The Michigan Southern Railway Company was established by the State of Michigan under a special charter which defines the basis on which it was to be taxed. The State afterwards authorized it to consolidate with the Northern Indiana Railroad Company, with no change in the basis of taxation, and a general railroad law was passed at about the same time. This law, and various similar acts afterwards passed, provided that companies within the State might consolidate with companies in other States, and that every corporation formed under the law should be taxed at a certain rate. The Michigan Southern and Northern Indiana Company meanwhile became part of the Lake Shore and Michigan Southern Railway Company under consolidation agreements with corporations in other States through which the route of the consolidated company lies and in which its business is done. A writ of *mandamus* sought for by the State Treasurer to compel the Auditor General to assess the company under the general law was denied; it is not a corporation formed under that law, and taxes are properly assessed upon the basis fixed by the original special charter. *State Treasurer v. Auditor General*, 224.
15. A State cannot tax the whole track and equipments, the gross earnings, or the entire capital stock of a road which lies partly without its boundaries, and is partly operated in other States. It can only tax that part of the road property which lies within its jurisdiction or the proportion of stock representing that part of the road. *Id.*
16. A tax upon the gross earnings of a railway company whose road is partly outside of the jurisdiction, is illegal, not only because of the want of jurisdiction, but because it is not levied upon a rule of equality with corporations whose business is wholly in the State. *Id.*
17. A tax purchase by an agent in his own name but with his prin-

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cipal's money does not support a resulting trust in his principal's favor. *Muxfield v. Willey*, 252.
18. A bill to quiet title as against sales to the State for unpaid taxes cannot be maintained as against the Auditor General unless the State consents to the suit and designates that officer to represent it as party defendant thereto. *Burrill v. Auditor General*, 256.
19. A joint bill for relief against a tax sale will not lie where the complainants have no common grievance beyond being owners in severalty of distinct parcels of land sold for the tax. *Brunner v. Bay City*, 236.
20. A tax-title is invalid where the land has been assessed in one body at one sum, while a particular share of the whole tax has been arbitrarily apportioned to a specific parcel. *Wyman v. Baer*, 418.

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1. A tenant in common cannot have, as such, any peculiar interest in any specific portion of the entire tract held in common; and his possession is subject to the incidents of partition whatever the portion that may be thereby set off to him. *Tharp v. Allen*, 389.
2. Whatever a tenant in common takes by partition he takes practically as a purchaser from the aggregate tenancies. *Id.*

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TRESPASS.

1. A person arrested on justice's warrant, for trespass on land, made no objection to the sufficiency of the affidavit on which the warrant was issued, nor to the regularity of his arrest, but pleaded the general issue with notice that the land was his own freehold, and went to trial. *Held*, that he could not, on special appeal, object for the first time to the sufficiency of the affidavit, even though no right of arrest could be founded on it. *Maxwell v. Deens*, 35.
2. The fact that an affidavit for the arrest of a trespasser on land is defective, does not affect the issue on the merits. *Id.*
3. An affidavit for the arrest of a trespasser does not state the necessary facts if it is made by an agent and merely sets forth that his principal has a good cause of action, as deponent verily believes, against defendant, against whom he applies for process of warrant in behalf of his principal for trespassing on the latter's lands. *Id.*
4. In an action for trespass *quare clausum* for entering land and cutting timber it is correct to charge that if the value of the timber cut covered the damage thereby done the land, that should be the basis of the verdict, but if not, it should be the damage done the land by the cutting and removal of the timber. *Thompson v. Moiles*, 42.
5. A suit puts in question only such rights as existed when it was begun, and acts making defendant a trespasser *ab initio* must appear to have been done before suit to justify striking out evidence that would otherwise establish a defence. *Norton v. Rockey*, 460.

decree does not relate back for: SPECIFIC PERFORMANCE, 5,—**330.**
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TRIAL: *Excusing juror*, 1; *challenge*, 2-5; *offers of testimony*, 6, 7; *charge*, 8-13; *exceptions*, 13; *province of jury*, 14, 15; *compulsion of jury*, 16.

1. A juror may be excused at any time before he has been sworn, for any reason personal to himself which seems sufficient to the judge. So *held* where the excuse was that he was to be a witness in the next case on call. *People v. Carrier*, 442.
2. A juror who has taken his place in the jury-box, and with whom both parties profess to be satisfied, can yet be peremptorily challenged by the prosecution before he is sworn. *Id.*
3. Overruling a challenge for cause and compelling the party to resort to a peremptory challenge does not prejudice him where he still has a right of peremptory challenge which he does not use. *Sullings v. Shakespeare*, 408.
4. Where a juror challenged for opinion shows by his answer that he has no definite *recollections* there is no apparent ground for holding him disqualified. *Id.*

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5. One who has taken compensation for land condemned for a private way, cannot afterwards object to the validity of the proceedings on the ground of a juror's incompetency; it was his duty to inquire therein while proceedings were pending. *Chatterton v. Parrott*, 432.
6. The statement of what it is proposed to show in making an offer of testimony, is assumed to include all that is meant to be shown in addition to what has been already submitted, and if what is offered, though taken in connection with the evidence previously given is incompetent to establish the main fact, it is proper to exclude the testimony. *Linn v. Gilman*, 628.
7. An offer of testimony must, in a review of the case, be considered as it was made, and no facts not expressed or clearly implied can be intended. *Id.*
8. The reason for a ruling is not important in the review of a case, if the result is correct. *Kellogg v. Lovely*, 131.
9. The refusal of a charge is not error where it is substantially given in an instruction of greater scope and more favorable to the plaintiff in error. *Clark v. Rice*, 308.
10. The omission to rule expressly upon objections to injurious irregularities committed at a trial, will not protect them from review; the judge's silence may be construed as allowing them against objection. *Corning v. Woodin*, 44.
11. It is error to permit the charge and verdict in an action of trover to be read in the hearing of the jury on the trial of an action of replevin between the same parties as bearing on the subject matter. *Id.*
12. The plaintiff has a right to have the case submitted to the jury upon the theory on which he presents it. *Winchester v. King*, 102.
13. When exceptions are taken indiscriminately to every paragraph of the charge, they will be treated the same as if one general exception had been taken to the whole charge; and if any part of the charge is correct, the exceptions will be overruled. *Goodsell v. Seeley*, 623.
4. A trial judge cannot deprive the jury of its right of judgment even though the evidence submitted is positive and in part uncontradicted. But if the jury returns a perverse verdict he may set it aside, and order a new trial. *Woodin v. Durfee*, 424.
15. A man sued another for the value of a beer wagon, which plaintiff claimed to own, but which defendant had bought from plaintiff's stepfather. The evidence tended to show that the seller was the original owner, but that the plaintiff had authorized his mother to use his money in buying it in from a man who had bought it on a foreclosure against the stepfather. The purchaser had also been garnished by a creditor of the stepfather and compelled to pay him all that remained unpaid of the purchase price. *Held*, that the case was for the jury, and that plaintiff was entitled to have their judgment on his presentation. *Rider v. Kern*, 455.
16. After the jury had retired they returned into court and informed the judge that they had not agreed, but "stood eleven to one, and divided on $200." He thereupon told them, "If that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small." *Held*, to be error. *Goodsell v. Seeley*, 623.

absence of findings, mistrial: PRACTICE, 17, 18,—**83.**
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TROVER.
1. In Michigan a chattel note is transferable and the assignee can sue upon it (Comp. L. § 5775) and trover lies for its conversion. *Hicks v. Lyle*, 488.
2. A bailee of a note who gives it up, without authority, to be destroyed, is liable for its conversion. *Id.*

damages for conversion of logs: DAMAGES, 8,—**485.**
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VENDOR AND PURCHASER: see SALE.
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VENDOR'S LIEN.
1. The lien on property retained by the vendor covers all its natural incidents and accessories unless circumstances show a different intent. *Kellogg v. Lovely*, 131.

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WIFE: see DIVORCE; HUSBAND AND WIFE.
WILL: *Oral agreement to devise*, 1; *probate*, 2–4.
1. An oral agreement to devise property to a specified person is voidable during the testator's lifetime, and is not in itself valid if it covers real estate. And where the devise is not in accordance with the agreement a payment of money in consideration of such promise is without consideration, and the money may be recovered back by the one who made the payment or by his personal representative. *DeMoss v. Robinson*, 62.
2. In proceedings for the probate of a will the only main issue is whether or not the paper propounded is a will, and if there are also minor issues they belong to the same inquiry and cannot be presented separately. *In re Hathaway's Appeal*, 326.
3. A petition for the probate of a will need not allege testamentary capacity; it is necessarily in issue. *Id.*
4. New issues need not be framed in the circuit court in will cases. *Ellair v. Wayne Circ. Judge*, 496.

bequest of beneficiary fund: MUTUAL BENEFIT ASSOCIATION, 1,—**429.**
dismissal of appeal from probate is a final judgment, APPEAL, 4,—**496.**
WITNESS.
1. A board of supervisors has power to subpœna witnesses (Comp. Laws § 469), but cannot arrest or commit them for contempt in refusing to appear. *In re Blue*, 268.
2. The fact that a witness' answer goes beyond the question, is not a ground of error where it was not objected to for that reason and there was no motion made to strike out any part of it. *Kent Furniture Mfg. Co. v. Ransom*, 416.
3. After a witness, called to sustain the credit of a party, has testified that he is acquainted with him and has lived in his neighborhood for many years but does not know his reputation for truth and

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veracity, he may also be asked whether he has ever heard it questioned. *McLaughlin v. Sulley*, 219.
4. A witness cannot be impeached by contradiction on collateral matters. *Hamilton v. People*, 186.
5. A witness cannot be asked what he stated in an affidavit, but the affidavit itself must be produced. *DeMay v. Roberts*, 160.
6. In trover for converting pension money collected by defendant there is no error in refusing to allow a witness for the plaintiff to be cross-examined as to whether he had never been arrested for conspiring to procure fraudulent pensions. *Marx v. Hilsendegen*, 336.
7. Stenographer's notes of a party's testimony in a civil case, cannot, unless by consent, be introduced to contradict him on a subsequent trial of the same case, especially if not authenticated. *Edwards v. Heuer*, 95.
8. The testimony of a witness as produced on direct and cross-examination must be taken altogether. *Maxwell v. Bay City Bridge Co.*, 278.
9. Where cross-examination has been unnecessarily restricted but full investigation has been obtained before the witness is dismissed, there is no prejudicial error. *Edwards v. Heuer*, 95.

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